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# *American Journal of International Law*

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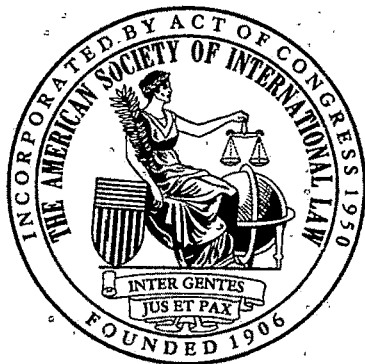
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*January 1999*

*Vol. 93 No. 1*



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# AMERICAN JOURNAL OF INTERNATIONAL LAW

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January 1999

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# DEVELOPMENTS IN INTERNATIONAL CRIMINAL LAW

## FOREWORD

Many of the contributions to this issue of the *Journal* focus on several recent historic developments in the field of international criminal law. In July of 1998, the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) concluded an intensive five-week session in Rome by adopting a statute for such a court. Although the United States voted against the statute, its vote, as several contributions to this issue make clear, does not signal U.S. opposition to an international criminal court as such, but, rather, concern that certain features of the statute produced by the Rome Conference may undermine the achievement of other international goals that the United States believes are no less critical for world order and the international protection of human rights. The United States has been a firm supporter of the two existing international criminal courts—the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—and its support may prove just as crucial to the success of the ICC.

Despite the current U.S. opposition, it appears likely that the ICC will come into existence through the ratification of the statute by sixty states. Once established, such a court could affect the essential constitutive structure of world politics in a myriad of ways, particularly the work of the United Nations Security Council under its Chapter VII jurisdiction. The debates about whether such a court is a “good idea” are no longer relevant. The issues now on the table are how to make the court an effective instrument that will contribute to the maintenance and improvement of world order. One would expect the United States to be an active participant in the process.

The ICC will benefit from the experience of the two ad hoc international criminal Tribunals established by the UN Security Council in recent years, the ICTY and the ICTR. These Tribunals are engaged in establishing an international jurisprudence on the prosecution of individuals for violations of international criminal law. They have addressed not only substantive and procedural law related to such prosecutions, but also many of the logistical problems such international tribunals must face. The jurisprudence produced and lessons learned by these Tribunals will inevitably provide important foundations for the new ICC.

Perhaps even more significant is the fact that the Tribunals and the negotiations in Rome may reflect a dramatic development in the international community regarding the punishment of grave international crimes. While the Nuremberg and Tokyo Tribunals marked an important beginning, only now may we well be witnessing the emergence of consensus in the international community that it accepts the responsibility to prosecute and punish, be it through international or domestic tribunals, persons who commit such crimes.

In its first conviction, the ICTY found Duško Tadić guilty of war crimes and crimes against humanity arising in a noninternational conflict. Even more precedent setting was the *Akayesu* case, decided on September 2, 1998, by the ICTR. It was the first conviction by an international tribunal for the crime of genocide. It was followed by the conviction of Anto Furundžija for war crimes. The need to contemplate these hideous crimes can never be a cause for celebration. However, international lawyers and broad segments of the world community have long pressed, first, for the criminalization of genocide and crimes against humanity, and, second, for the international application of that law to the

individual perpetrators. With these convictions, their efforts have now produced tangible and important results. We hope that the more credible and soon more probable prospect of punishment will serve as a deterrent to others in the future.

In October 1998, General Augusto Pinochet, the former Chilean dictator, was arrested in London where he had traveled for medical treatment. His apprehension was based on a Spanish warrant seeking extradition under the European Convention on Extradition. The warrant alleges that he is responsible for crimes against both Spanish nationals and nationals of other countries. Whether or not the UK Government surrenders Pinochet to Spanish jurisdiction or allows him to return to Chile (a fact unknown at the time of this writing), this event sends a strong signal to perpetrators of grave human rights violations: the international affirmation of the punishment of grave violations of human rights is increasing and the number of territories in which such violators may escape judgment is shrinking. If such perpetrators' states of nationality do not prosecute them, travel abroad may indeed be risky. While this development appears to bode well for the promotion of human rights law, its ramifications regarding certain types of domestic efforts by troubled countries to move beyond the past toward national reconciliation and the realization of liberal ideals remain uncertain. Thought must also be given to preventing abuse of this universal jurisdiction. In part, the ICC may serve as the key to resolving these collateral issues.

Alas, the persisting inability of the UN Security Council to prevent or at least arrest the continuing atrocities in Kosovo makes clear that such recent or contemplated measures as the operation of an ad hoc criminal court (the ICTY), the establishment of a permanent tribunal and the reduction of zones of immunity are, in themselves, not a panacea. Other institutional arrangements, fueled by broad popular demands for justice, are as urgently required as ever. Until they are set in place, the ultimate bulwark against human rights violations may still be unilateral or plurilateral humanitarian intervention, or threats thereof, as demonstrated by the NATO initiatives in Kosovo. But they are remedies whose potential for abuse is well-known and their lawfulness under the UN Charter remains controversial. We are pleased that several aspects of this vexed subject are also addressed in this issue of the *Journal*.

THE EDITORS IN CHIEF

## THE ROME CONFERENCE ON AN INTERNATIONAL CRIMINAL COURT: THE NEGOTIATING PROCESS

### INTRODUCTION

The object of this paper is to describe the negotiating process during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. It is told from the perspective of those that were *ex officio* at the center of negotiations, as members of the Bureau of the Committee of the Whole (CW).<sup>1</sup> It describes the main issues under consideration at the conference and the evolution of the negotiations, including an inside view of the development of the final package containing the principal elements of the statute of the court.

<sup>1</sup> See *infra* notes 5 and 6.



## ORGANIZATION OF THE CONFERENCE

As the conference began its work in Rome on June 15, 1998, the task awaiting the negotiators was daunting. Despite the work accomplished by the Preparatory Committee (PrepCom),<sup>2</sup> the draft statute that ultimately emerged from the PrepCom was riddled with some fourteen hundred square brackets, i.e., points of disagreement, surrounding partial and complete provisions, with any number of alternative texts.<sup>3</sup> Within the time available, the conference could not have possibly resolved the outstanding issues systematically.

The formal organization of the conference had been planned in advance and was approved on the first day. The need to undertake the substantive work without wasting any time was generally understood.<sup>4</sup> Managing the negotiating process was the responsibility of the Bureau of the CW, composed of representatives of Canada, Argentina, Romania, Lesotho and Japan.<sup>5</sup> To assist the bureau, the chairman maintained the practice begun during the PrepCom sessions of using an enlarged bureau including a number of coordinators.<sup>6</sup> In contrast to the practice of the PrepCom, however, the chairman requested all coordinators at the outset to take the lead in drafting provisions in their area of responsibility and to refer only unbracketed texts to the CW so as to avoid miring it in negotiations on the multitude of square brackets. This method was consistently followed during the conference.

## NEGOTIATING THE TEXT

*Basic Issues and Positions*

The Rome statute of the court includes thirteen parts,<sup>7</sup> many of which were the subject of intensive negotiations and careful crafting. However, the most controversial elements

<sup>2</sup> A draft statute had been developed from 1995 to 1998 by the Ad Hoc and Preparatory Committees established by the United Nations General Assembly. A great deal was accomplished in the PrepCom, under the chairmanship of Adriaan Bos of the Netherlands. The structure of the draft statute was developed and generally agreed on by states; the framework for a new innovative system of international criminal justice was developed, merging elements from different legal systems, in particular those of civil and common law; and there was agreement on some substantive issues, including "complementarity" (the relationship between the international criminal court (ICC) and national courts) and several of the general principles of criminal law to be included in the statute.

<sup>3</sup> UN Doc. A/CONF.183/2/Add.1 (1998).

<sup>4</sup> The main organs of the conference, i.e., the Committee of the Whole and the Drafting Committee, began their work soon after the beginning of the conference, in parallel with the plenary. In addition, a multitude of informal working groups and consultations were arranged throughout the conference, all reporting directly or indirectly to the CW. These took place concurrently with the formal meetings and expanded rapidly to fill all the available time, including eventually meetings lasting most of the night.

<sup>5</sup> The plenary dealt with the organization of work, the delivery of policy statements of a general nature (which lasted four days) and the formal adoption of the statute at the end of the conference. The CW was responsible for the development of the statute, and the Drafting Committee was responsible for ensuring proper and consistent drafting throughout the statute in all languages. In general, issues once debated in the CW were referred to working groups or coordinators. The latter then reported the results of their work to the CW, and texts accepted by the CW were referred to the Drafting Committee. Texts refined by the committee had again to be approved by the CW. The final report was sent from the CW to the plenary, with a complete text, on the final day of the conference. There were some variations on this procedure; for example, some parts of the draft statute were sent directly to working groups or to the Drafting Committee without preliminary CW discussion (e.g., some procedural provisions), and part 2 of the statute did not go to the Drafting Committee except informally.

<sup>6</sup> Many of those had served as such during the PrepCom sessions and were reappointed by the CW chairman-designate, in order to ensure continuity and valuable expertise and leadership in the very complex negotiations that lay ahead. Others were new, replacing PrepCom coordinators who could not continue, and leading negotiations on new areas of the statute.

<sup>7</sup> 1. Establishment of the Court; 2. Jurisdiction, Admissibility and Applicable Law; 3. General Principles of Criminal Law; 4. Composition and Administration of the Court; 5. Investigation and Prosecution; 6. The Trial;

of the statute—those that could make or break the conference—were largely contained in Part 2, Jurisdiction, Admissibility and Applicable Law, which includes the list and definition of crimes. For that reason, in addition to organizing the work on all parts of the statute, the negotiating efforts of the chairman and the Bureau of the Committee of the Whole were mainly directed at resolving problems in part 2.

On some issues or groups of issues, participating states coalesced into various groups. The most organized was the "like-minded group" (LMG), which had promoted the establishment of an ICC during the PrepCom and generally favored a strong and independent court. It was composed of middle powers and developing countries, a number of which had directly suffered from some of the crimes described in the draft statute.

A second group consisted of the permanent members of the Security Council (P-5). Their solidarity was clearest on two points: a strong role for the Council vis-à-vis the court, and the exclusion of nuclear weapons from the weapons prohibited by the statute. With the exception of the United Kingdom, which had joined the LMG shortly before the conference, the P-5 also wanted the jurisdiction of the court and its exercise to be carefully circumscribed. They paid particular attention to its jurisdiction over armed conflicts, but their main area of concern (international vs. internal conflicts) varied according to their national perspective.

Opposed to the P-5 were those states that were extremely suspicious of the Security Council and insisted on the inclusion of nuclear weapons among weapons prohibited by the statute (e.g., India, Mexico and Egypt). In general, however, those same states espoused positions that were similar to those of the P-5, in advocating a court whose powers would be relatively restricted.

With the exception of these trends, the conference was characterized by a mosaic of positions that transcended political and regional groupings. Without opposing a role for the Security Council vis-à-vis the court, for example, many states believed that the Council could not be relied upon to administer justice in an impartial manner, and that care should be taken not to let the court's independence be undermined. Most developing states advocated the inclusion of aggression among the core crimes covered by the statute, and many favored prohibiting nuclear weapons. Some wanted terrorism or regional drug trafficking to be covered as well (e.g., Egypt, Algeria, Turkey, Sri Lanka and Caribbean states), while others considered such crimes as properly belonging to domestic jurisdiction.

Many differences also existed over jurisdictional issues: how the jurisdiction of the court could be triggered; whether states should automatically accept the court's jurisdiction over crimes as soon as ratification took place, or be protected by some form of additional case-by-case consent; and, above all, which states, if any, must accept the court's jurisdiction before the court could actually exercise its jurisdiction.<sup>8</sup> It is on this issue that the differences proved irreconcilable and consensus eventually broke down, leading to a vote at the end of the conference.

Finally, the influential role of nongovernmental organizations (NGOs) must be mentioned. NGOs not only lobbied for certain positions, but also made available the expertise they had built up over years of focusing on this subject. While their positions

7. Penalties; 8. Appeal and Revision; 9. International Cooperation and Judicial Assistance; 10. Enforcement; 11. Assembly of States Parties; 12. Financing; and 13. Final Clauses.

<sup>8</sup> Proposals ranged from universal jurisdiction, advocated for example by Germany, to the mandatory consent of the state of nationality of the accused, argued most forcefully by the United States.

varied, in general the NGOs pressed for a strong court with automatic jurisdiction, an independent prosecutor, sensitivity to gender concerns and jurisdiction over internal armed conflict.

### *Early Discussions on Part 2*

The main political issues contained in part 2 of the statute were sensitive and complex. They were also, in the minds of many delegations, intertwined. Delegations were prepared to consider the inclusion of a broad range of crimes, if the jurisdiction of the court was limited, for example, by requiring state consent on a case-by-case basis or by permitting states to opt in or opt out of certain crimes. Conversely, the possibility of automatic jurisdiction upon ratification, or of a system close to universal jurisdiction, provoked some delegations to argue for a limited range of crimes, narrower definitions and higher thresholds. The permissibility or not of reservations also had an impact on positions.

Early debates in plenary and in the CW largely consisted of formal statements, without much indication of where the middle ground might be found. As soon as the general debate in the CW concluded, the chairman undertook a series of private, bilateral meetings with delegations in the hope that elements of compromise would begin to appear. This exercise was disappointing. For the most part, the same, well-known public positions were repeated in private with little elaboration, let alone indications of flexibility. At the same time, considerable pressure was exercised with a view to having the chairman and bureau submit a new paper to the CW, but without any agreement on what that paper should contain.

### *The Bureau Papers*

As the third week of the conference drew to a close and the bureau took stock of the state of negotiations, progress on the main issues in part 2 of the draft statute had ground to a near standstill. Informal summaries of debates, prepared by the conference's secretariat for the bureau and by NGOs, revealed clear trends on most issues, which were met with equally clear and determined opposition. The road to an acceptable text of part 2 was neither certain nor apparent. States were reluctant to agree to compromises on specific issues without knowing how the entire package would emerge. More fundamentally, some states, as it turned out, simply could not accept much of the compromise language put forward by coordinators, and therefore strenuously defended their positions, preventing unbracketed texts from emerging.

In an effort to break the logjam, the bureau decided to put forward a discussion paper on part 2. First, the chairman organized a meeting of approximately thirty delegations on Sunday, July 5, at the Canadian Embassy in Rome, to explore possible areas of compromise and to analyze the reactions of delegations. The meeting was limited in size because of the available facilities, but was not secret. The attending delegations reflected different regions and represented varying perspectives. The meeting was less successful than had been hoped. On jurisdictional issues, in particular, strong opposition to majority trends held firm.

When the bureau met on July 6 to review the results of the Sunday meeting, it concluded that it would have to take the lead in moving the negotiations forward. A discussion paper on part 2<sup>9</sup> prepared by the bureau was distributed to delegations on July 7. The paper created a more coherent structure for the part, as well as for several key

<sup>9</sup> Bureau Discussion Paper, UN Doc. A/CONF.183/C.1/L.53 (1998).

articles such as the jurisdiction provisions. Substantively, it was a combination of proposals and options. It incorporated the texts of articles that had already been substantially negotiated<sup>10</sup> but, despite the strong trends in the debate, maintained several options for aggression, treaty crimes, the threshold for war crimes, prohibited weapons and internal armed conflict.

The bureau had intended that the paper would focus discussion and lead to compromises on outstanding problems. The results, however, were mixed. From July 8 to 9, the CW considered the bureau's paper. The reaction of states was mostly positive with respect to the structure, as they were presented for the first time with clear proposals and clear options. However, on substance, the debate was largely a repeat of earlier interventions. These views were in turn carried over into various informal consultations that followed. Coordinators reported to the bureau that delegations were sticking firmly to their positions on most of the main issues, preventing them from producing solutions.

Throughout this period, the CW chairman continued to hold a series of bilateral discussions with many delegations. Some delegations proved more willing to discuss areas of compromise and bottom-line positions privately, but not publicly. On July 10, the bureau decided that it had to continue to push the negotiations or else time would run out. Thus, the bureau produced a proposal that was circulated later that day.

The bureau's proposal on part 2<sup>11</sup> was bold in some respects, cautious in others. It included proposals on a number of additional provisions, removing options that, in the bureau's view, were neither widely supported nor tenable. Nevertheless, it retained some options on the most controversial provisions.<sup>12</sup>

The reaction of some states to some of the approaches included in the proposal was strong, almost confrontational. Underlying this attitude was the realization by delegations that the current debates were probably their last chance to influence the content of the final statute. They believed that their best chance to achieve that objective was to pull no punches. But the debate on other, previously difficult issues became surprisingly muted. As the endgame was near, the focus of delegations turned to key priority concerns. This evolution can best be understood through a few illustrations taken from the two main areas of controversy, crimes and jurisdiction.

### *Issues Relating to Crimes*

As already mentioned,<sup>13</sup> many delegations wanted more crimes covered by the statute than the three core crimes of genocide, crimes against humanity and war crimes. Among these crimes were aggression, despite the lack of any agreement on a definition of aggression or the modalities for its application, and the so-called treaty crimes, illicit trafficking in drugs and terrorism (the other treaty crime—attacks on UN and associated personnel—was later included as a specific war crime<sup>14</sup>). The bureau's discussion paper had left the matter open.

The bureau had concluded before making its proposal that, given the absence of agreement despite lengthy discussions, the negotiations could not continue much longer. The proposal therefore set a deadline for delegations to produce a broadly acceptable solution. Failing that, the bureau would propose that these crimes be ad-

<sup>10</sup> These included the article on genocide, much of the provision on crimes against humanity, and parts of the provisions on war crimes, complementarity, challenges to jurisdiction and applicable law.

<sup>11</sup> Bureau Proposal, UN Doc. A/CONF.183/C.1/L.59 (1998).

<sup>12</sup> These options are discussed *infra* under "Issues Relating to Crimes" and "Issues Relating to Jurisdiction."

<sup>13</sup> See "Basic Issues and Positions" *supra*.

<sup>14</sup> Now appearing as Article 8(b) (iii) of the Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9\* <[www.un.org/icc](http://www.un.org/icc)>, reprinted in 37 ILM 999 (1998) [hereinafter ICC statute].

ressed at a later time by way of a protocol or review conference.<sup>15</sup> This decision was particularly unwelcome. Many delegations were upset by what was described as an unacceptable deadline. Some insisted until the very end of the conference that aggression and treaty crimes be included in the text and that sufficient time must somehow be found to accomplish this.

The greatest controversy in the war crimes area concerned crimes committed during internal armed conflicts.<sup>16</sup> Here again, the bureau had left various options in its discussion paper, hoping for negotiations that never occurred. In its proposal, the bureau included two sections that made clear that the statute should include such crimes.<sup>17</sup> However, to garner broader support for the inclusion of this provision, the bureau added two safeguard clauses that had been discussed during the informal consultations.<sup>18</sup> The bureau's approach did not solve the problem. A few delegations continued to insist that the statute should not apply to internal armed conflicts, irrespective of the new safeguards, while many others criticized those safeguards, on the grounds that they departed from international humanitarian law and would inhibit the court's ability to prosecute cases occurring during internal armed conflicts. Those reactions ultimately proved useful, reflecting as they did widespread support for covering internal armed conflicts and a desire to ensure that any safeguards conformed with international humanitarian law. Consultations began almost immediately among many delegations to improve the bureau's proposal.

The initial discussion over the list of weapons whose use would constitute a war crime reflected divergent and clearly defined positions but did not presage the extreme controversy that would arise in the latter part of the conference. There was some support for including nuclear weapons and land mines in the list of prohibited weapons, but also strong resistance on the grounds that the threat or use of such weapons was not actually prohibited under existing international law.<sup>19</sup> In its proposal, the bureau therefore offered an exhaustive list that did not include land mines or nuclear weapons, but it provided for an amendment procedure of the list for such weapons as "become the subject of a comprehensive prohibition."<sup>20</sup> Several delegations were displeased that nuclear weapons and, to a lesser extent, land mines were not included, particularly since chemical and biological weapons, called by some the "nuclear weapons of the poor,"

<sup>15</sup> Bureau Proposal, *supra* note 11, Art. 5.

<sup>16</sup> Most delegations accepted that common Article 3 of the 1949 Geneva Conventions would apply in internal armed conflicts, and many delegations favored adding other serious violations of the laws and customs of war occurring in internal conflicts. Certain delegations, however, continued to resist fiercely the inclusion of internal armed conflicts altogether or some of the applicable law.

<sup>17</sup> The first section incorporated the provisions of common Article 3 of the 1949 Geneva Conventions and thus was supported by almost all delegations. Even some of those delegations that publicly stated that they did not think the statute should apply to internal armed conflicts indicated privately that if it did, they could accept a provision based on common Article 3. The second section, which defined the other serious violations of the laws and customs of armed conflict to be governed by the statute, was more controversial.

<sup>18</sup> The bureau's discussion paper had included the provision from the Geneva Conventions that the sections did not apply to internal disturbances and tensions such as riots. To this, the bureau's proposal added new language derived from Additional Protocol II to the Geneva Conventions of 1949:

It applies to armed conflicts that take place in the territory of a State Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.

The second safeguard clause, also drawn from Additional Protocol II, protected the responsibility of states to maintain or reestablish law and order.

<sup>19</sup> It was understood that the statute was not to create new substantive law, but only to include crimes already prohibited under international law. See, e.g., 1 Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Supp. No. 22, at 16, UN Doc. A/51/22 (1996).

<sup>20</sup> Bureau Proposal, *supra* note 11, Art. 5 *quater*, B(o)(vi).

were prohibited. This was an extremely difficult issue, as it was well-known, including by the promoters of the inclusion of nuclear weapons, that such a move would permanently deprive the court of essential support, and render it powerless.<sup>21</sup>

### *Jurisdictional Issues*

The provisions relating to jurisdiction were the most complex and most sensitive, and for that reason remained subject to many options as long as possible. The debates surrounding some of the provisions contained in the bureau's proposal, in particular, generated strong reactions.

One of the difficult questions consisted in determining whether entitlement to refer situations to the court should be vested in states parties, the Security Council and/or the prosecutor. The right of states parties to do so was overwhelmingly endorsed early on. Giving power *proprio motu* to an independent prosecutor received considerable, but not general, support. The rights of the Security Council to refer cases to the court and, even more, to force the court to defer cases for political reasons were vigorously opposed by various delegations.

The bureau's proposal maintained two alternatives to the Security Council's ability to defer cases before the court and also contained an option that no such provision be included. Only a few delegations opposed a role for the Security Council in relation to the court (referrals and deferrals), but they showed great persistence. This was to remain a problem until the end of the conference.<sup>22</sup>

In addition to reference by states and the Security Council, the bureau retained the provision permitting the prosecutor to initiate cases *proprio motu* with no "zero option." However, to balance this approach, reference was made to the possibility of adding safeguards before the prosecutor could act on his or her own.<sup>23</sup> Giving the prosecutor this power generated very little discussion, as it was generally seen that the battle against an independent prosecutor had been lost, and the issue began to pale in comparison with other jurisdictional issues, notably preconditions for the exercise of the court's jurisdiction.<sup>24</sup>

A wide range of options had been put on the table early on with respect to those preconditions. A German proposal providing universal jurisdiction for the court enjoyed

<sup>21</sup> Other proposals relating to crimes proved less controversial. Except for a few specific provisions, the bureau's proposal included texts on genocide and crimes against humanity that seemed broadly acceptable. The negotiations on some elements of the provision on war crimes had advanced somewhat and the proposal reflected these developments, relating for example to UN personnel and children. Yet the gender-related crimes (including forced pregnancy) and the broader question of a threshold for war crimes (limiting jurisdiction to those committed as part of a plan or policy or on a large scale) were unresolved. Despite the opposition of a number of states to such a threshold, some options were maintained for the time being. The bureau's proposal also added a new provision that is noteworthy. It provided that the "Elements of Crimes" would be elaborated later by the Assembly of States Parties and would be used by the court to interpret and apply the crimes in the statute. This procedure had been proposed by the United States during the March Prep-Com and had received some measure of support in the CW debates and during informal consultations.

<sup>22</sup> See *infra* note 36, describing the amendments proposed by India on the final day.

<sup>23</sup> Bureau Proposal, *supra* note 11, Art. 12, Option 2.

<sup>24</sup> At that time, even discussions on "automatic jurisdiction," meaning that states that ratify the statute must automatically accept the court's jurisdiction over the crimes, without the need for additional acts of acceptance on a case-by-case basis, were no longer really controversial. A few delegations had insisted on some form of acceptance of jurisdiction on a case-by-case basis. However, given persistent trends in the debate, only two options were included in the bureau's proposal: automatic jurisdiction for all core crimes, and automatic jurisdiction for genocide only, with opting in for crimes against humanity and war crimes. The bureau's recognition of automatic jurisdiction for genocide attracted little criticism, so that it was clear that the concept of automatic jurisdiction was gaining broader currency. To compensate, those who wanted controls over the exercise of jurisdiction by the court redirected their efforts to other areas, notably the preconditions for its exercise of jurisdiction.

strong support among some states and the vast majority of NGOs. A Korean proposal that provided for somewhat narrower, but still broad jurisdiction also enjoyed wide support. It suggested that the court could exercise jurisdiction if any of four states were party to the statute (the territorial state, the state of nationality of the accused or the victim, and the custodial state).

The discussion paper had narrowed the range of options but had deliberately taken a cautious approach.<sup>25</sup> The bureau's proposal again provided several alternatives, but they were further narrowed down and different preconditions were proposed for genocide and other crimes. No options were set out for the crime of genocide; the Korean proposal was adopted. For crimes against humanity and war crimes, three options were presented: the Korean proposal, the territorial and custodial states, and the state of nationality of the accused only.

All of these options were criticized, but for entirely different reasons. A few delegations strongly attacked the Korean proposal because it amounted to quasi-universal jurisdiction and would create broad obligations for non-states parties. But many were disappointed that other options would severely limit jurisdiction, particularly the option requiring the acceptance of the state of nationality of the accused. They observed, correctly, that these options enjoyed limited support.

The criticisms of the bureau's proposal for the most part did no more than confirm once again where the main areas of dispute lay. However, given the lateness of the hour, delegations had begun to focus on only those issues of greatest concern to them and to leave aside the others.

### *High Noon*

The bureau was still faced with an enormous problem. No agreement existed on the fundamental questions as the conference commenced its final days.<sup>26</sup> The CW chairman urged delegations, publicly and privately, to carry out consultations on the remaining problems, with the assistance of coordinators.<sup>27</sup> As the final week drew to a close, solutions were found to a number of sensitive issues, but the key problems in part 2 remained outstanding, despite pressure from the chairman and the bureau, and lobbying by procourt states and even the Secretary-General of the United Nations.

With two days remaining, the bureau was faced with two alternatives: to propose a final package for possible adoption by the conference, or to report to the plenary that an

<sup>25</sup> The broadest nexus was based on the Korean proposal. A narrower option permitted the court to proceed only with the acceptance of the territorial state, and another only with the acceptance of the state of nationality of the accused. A final option provided for acceptance by the territorial or custodial state.

<sup>26</sup> "High Noon" was the description offered by *Terra Viva*, an independent publication of Inter Press Service in partnership with the NGO No Peace Without Justice. Under the headline "High Noon" on July 15, 1998, *Terra Viva* drew an amusing analogy:

Like the lone sheriff in a classic Western, chairman Philippe Kirsch is conducting a desperate but determined search for a critical number of deputies to back his attempt to gather support for a compromise Statute for an International Criminal Court (ICC) before the Wednesday "high noon" deadline of sorts, set for the Committee of the Whole to complete its work.

<sup>27</sup> In the meantime, sensing that time was running out and concerned to make every possible effort to achieve general agreement, the head of the Japanese delegation, Ambassador Hisashi Owada, had begun a low-key effort to bridge the gap on jurisdiction. He invited a number of delegations to a meeting on Sunday, July 12, to discuss the issue and explore possible solutions. The meeting was inconclusive, but the Japanese delegation continued its efforts to consult delegations individually and in groups, including the like-minded group. While these efforts did not lead to general agreement, an idea emerged for an opting-out mechanism for some core crimes, in the form of a protocol, which would have a time limit. The idea, a 10-year opting out for both crimes against humanity and war crimes, was intended to allow states an opportunity to see how the court would exercise its jurisdiction, including in interpreting complementarity and the specific crimes. The bureau would later draw on that idea in the final package, in a different form.

agreement was not possible and begin preparations for a second session. The bureau seriously weighed the two options and decided to attempt a package deal. If the proposal failed, the second option could be revived. Contacts with delegations reflected a prevailing view that deferring the conclusion of the statute would be a serious mistake. Most delegations were very concerned that a second session would be just as likely to fail, ending hopes for the establishment of an international criminal court for many years, or that it could lead to an unacceptably weakened court. The few delegations that favored deferral were mostly those that were not enthusiastic about the establishment of a strong court to begin with.

The bureau met several times over the next two days to prepare the final package. As the bureau considered the various options, the chairman and other members met with delegations to consult on possible solutions. These discussions continued until very late on the penultimate day of the conference, in an effort to give delegations as much time as possible to meet informally and to consider suggestions that were still being made. By the end of Thursday, July 16, the bureau submitted its final package, which delegations received in the early hours of July 17.

### *The Final Package*

The draft statute presented by the bureau represented the state of the negotiations to that point and the clear trends that had emerged from the debates and consultations. However, in developing the final package, the bureau maintained the approach it had taken since the beginning of the conference: it sought to attract the broadest possible support for the statute. This course was not only mandatory under the rules of procedure;<sup>28</sup> it was also essential, in the bureau's view, for the sake of the future court. The bureau was firmly convinced that a strong court required more than strong provisions in the statute. The court would also need widespread political and financial support to ensure its credibility and effectiveness in the world. This view had led the bureau to resist early suggestions for voting on individual provisions where solid majorities were guaranteed, as well as demands that its papers exclude all options that reflected a minority view.

The final package, which contained the text of the statute that was later adopted, is described elsewhere in this issue of the *Journal* and its content need not be repeated.<sup>29</sup> Suffice it to say that it contained very few surprises. Most of the provisions reflected options in the bureau's previous proposal. In a few areas, the bureau developed solutions of its own to bridge gaps and accommodate concerns in such a way as to broaden support for the court. This approach explains, for example, the reference to the crime of aggression despite the absence of agreement over its definition;<sup>30</sup> the inclusion of internal armed conflicts with a less restrictive safeguard than the one contained in the bureau's proposal;<sup>31</sup> the deferral of the intractable controversy over weapons of mass

<sup>28</sup> Rules 34 and 52 of the conference's Rules of Procedure, UN Doc. A/CONF.183/Add.2 (1998).

<sup>29</sup> See Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, *infra* p. 22.

<sup>30</sup> Article 5(2) of the ICC statute, *supra* note 14, includes the crime of aggression but specifies that the court shall not exercise jurisdiction over the crime of aggression until a definition of aggression and the applicable preconditions are settled on in a review conference, in accordance with the amendment procedures of the statute.

<sup>31</sup> The resulting clause contains the generally accepted clarification that internal disturbances and tensions, such as riots and isolated and sporadic acts of violence, do not constitute armed conflicts. The additional restriction for internal armed conflict, which would have required that an armed force or group operate under responsible command and with control over territory enabling them to carry out sustained and concerted military action, was deleted owing to lack of support.



destruction;<sup>32</sup> the insertion of a new provision in the final clauses permitting states to opt out for war crimes only for an initial period of seven years;<sup>33</sup> and the addition of a new article setting forth the preconditions for the exercise of jurisdiction.<sup>34</sup>

The final package was available to delegations in the early hours of the final day of the conference. Because of the delays in producing the translated texts, there were concerns that some delegations might object to adopting the statute on procedural grounds.<sup>35</sup> It is interesting that this issue never arose publicly. Delegations made clear throughout the day that there was strong support for the bureau's final package. At the same time, a few delegations registered their strong concerns regarding the approach taken on jurisdiction, the role of the Security Council, and the exclusion of nuclear weapons.

The LMG, which had concerns about certain aspects of the final package, nevertheless supported it and began an active lobbying campaign to build momentum toward adoption. The group also met and developed a strategy to counter procedural challenges to the adoption of the package as a whole. Other blocs, including the Non-Aligned Movement and the P-5, were split on the final package and countries were left to determine their own individual positions. This was a critical factor in the outcome of the conference.<sup>36</sup>

### CONCLUSION

It is regrettable that the Rome Statute of the International Criminal Court was not adopted by general agreement. The statute is not a perfect instrument; no internationally negotiated instrument can be. It includes uneasy technical solutions, awkward formulations and difficult compromises that fully satisfied no one. But it is a balanced instrument, furnished with enough strength to ensure the effective functioning of the court and sufficient safeguards to foster broad support among states.<sup>37</sup> Some of the proposals that were made to alter this balance toward the end of the conference would have done irreparable damage to the viability of the statute, one way or another.

The challenge ahead, to be taken up largely through the work of the Preparatory Commission, will be to supplement the statute, seriously address any legitimate concerns that may still exist about its implementation, and ensure judicial fairness and certainty.

<sup>32</sup> The inclusion of nuclear weapons was not possible in view of the current state of international law and the loss of support that the court would suffer if there were an attempt to outlaw nuclear weapons through this forum. On the other hand, excluding nuclear weapons while including the "poor man's weapons of mass destruction" (e.g., biological and chemical weapons) proved equally impossible, as to do so would have sent a political signal unacceptable to many delegations. Therefore, none of these weapons are included in the list of prohibited weapons in Article 8(2)(b) of the ICC statute, *supra* note 14; instead, a mechanism was added to allow the issue to be reconsidered at a review conference (Article 8(2)(b)(xx)).

<sup>33</sup> *Id.*, Art. 124.

<sup>34</sup> This article narrows the preconditions to correspond as closely as possible with current international criminal law norms. Thus, the preconditions are that the states parties must be the territorial state *or* the state of nationality of the accused. *Id.*, Art. 12.

<sup>35</sup> Rule 30 of the Rules of Procedure of the conference, *supra* note 28, required, as a general rule, that proposals be circulated not later than the day preceding the meeting at which they were to be considered.

<sup>36</sup> The proposed amendments by India relating to the role of the Security Council and nuclear weapons were known to evoke a certain resonance among many nonaligned members and, had the Non-Aligned Movement adopted a formal position on these proposals, a large number of its members would have had to support them. However, many of those members, recognizing that such amendments would unravel the final package and likely preclude the adoption of the statute, solidly voted against the amendments when proposed. Indeed, members of the Non-Aligned Movement seconded the no-action motion proposed by Norway, which led to the rejection of the Indian amendments. The United States-proposed amendments were also rejected overwhelmingly, with only China among the P-5 countries supporting them.

<sup>37</sup> As noted by the United Nations, the version that was adopted represented "a very delicately balanced text," a "package," which was the "product of intense negotiations and judicious compromises designed to reach widespread agreement." UN Department of Public Information, *International Criminal Court: Some Questions and Answers* 2 (undated) <[www.un.org/icc](http://www.un.org/icc)>.

This challenge can be met in particular through the development of rules of procedure and evidence, an enumeration of Elements of Crimes, and other necessary instruments,<sup>38</sup> which will be within the mandate of the commission.

The role of the Preparatory Commission, however, is not to reopen the statute or modify its provisions, directly or indirectly. The statute contains numerous judicial safeguards, and provisions aimed, essentially, at protecting state interests. The powers of the court are not as strong as many had hoped, but it can still fulfill its role if the integrity of the statute is maintained, and not undermined overtly or covertly. Irrespective of the legitimacy of the objectives sought by states in making proposals aimed at introducing further protections, the issue is now to ensure that future proposals will not result inadvertently in sheltering the very perpetrators of the crimes described in the statute. The establishment of an international criminal court is a historic achievement, the culmination of many decades of hope and hard work. It is our collective responsibility to keep in mind the *raison d'être* of the court, which is the protection of victims, and to ensure its success.

PHILIPPE KIRSCH AND JOHN T. HOLMES\*

### THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

The United States has had and will continue to have a compelling interest in the establishment of a permanent international criminal court (ICC). Such an international court, so long contemplated and so relevant in a world burdened with mass murderers, can both deter and punish those who might escape justice in national courts. Since 1995, the question for the Clinton administration has never been whether there should be an international criminal court, but rather what kind of court it should be in order to operate efficiently, effectively and appropriately within a global system that also requires our constant vigilance to protect international peace and security. At the same time, the United States has special responsibilities and special exposure to political controversy over our actions. This factor cannot be taken lightly when issues of international peace and security are at stake. We are called upon to act, sometimes at great risk, far more than any other nation. This is a reality in the international system.

In early 1993, shortly after the start of the Clinton administration, a process of review was begun with respect to the proposal for a permanent international criminal court, which had been under consideration by the International Law Commission since 1992. As we followed the deliberations of the ILC, we hoped that the draft statute for an ICC would reflect enough of our views so that the United States could actively begin to work toward establishment of the court.

Administration lawyers subjected the ILC drafts to extensive internal review and analysis. U.S. objectives included a significant role for the United Nations Security

<sup>38</sup> Resolution F in the annex to the conference's Final Act, UN Doc. A/CONF.183/10 (1998), provides a non-exhaustive list of instruments to be developed by the Preparatory Commission to facilitate the establishment and operation of the court.

\* Philippe Kirsch, Q.C., Legal Adviser of the Canadian Department of Foreign Affairs and International Trade, chaired the Committee of the Whole of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; and John T. Holmes, Counsellor (Legal Affairs) of the Permanent Mission of Canada to the United Nations, served as a member of the Canadian delegation and assisted the chairman of the Committee of the Whole throughout the conference. The authors gratefully acknowledge the suggestions and assistance of Darryl Robinson, also a member of the Canadian delegation to the conference.

Council in the referral of cases to the court, specific and properly defined war crimes in the statute of the court, exclusion of drug trafficking and the hard-to-define crime of aggression from the statute, and further study of our deep concerns about including crimes of international terrorism in the statute.<sup>1</sup>

The ILC's final draft statute for the ICC addressed many of the U.S. objectives and constituted, in our opinion, a good starting point for far more detailed and comprehensive discussions.<sup>2</sup> Though not identical to U.S. positions, the ILC draft recognized that the Security Council should determine whether cases that pertain to its functions under Chapter VII of the UN Charter should be considered by the ICC, that the Security Council must act before any alleged crime of aggression could be prosecuted against an individual, and that the prosecutor should act only in cases referred either by a state party to the treaty or by the Council. The ILC draft also enabled a state party to "opt out" of one or more categories of crimes when ratifying the treaty, an act that would limit the court's jurisdiction over that country's nationals for these particular offenses.

U.S. leadership in establishing the International Criminal Tribunals for the former Yugoslavia and for Rwanda strengthened our belief that the Security Council should have available to it a standing tribunal that could be activated immediately to hold perpetrators of genocide, crimes against humanity, or serious war crimes accountable for their actions. A permanent court would be more cost-effective and ensure uniformity in the evolution of case law. It would also serve as a more effective deterrent than the uncertain prospect of costly new ad hoc tribunals. President Clinton's public support for a permanent international court was demonstrated on six occasions prior to the diplomatic conference in Rome.<sup>3</sup>

In mid-1997 administration officials decided that long-standing U.S. positions should continue to be advanced by our negotiators. We were fairly hopeful at that stage that inclusion of the crimes of international drug trafficking and international terrorism would not be sustained, and that reason would prevail either to exclude a crime of aggression altogether or to define and qualify its inclusion properly. Conversely, we were not so confident about how cases would be referred to the court. We determined that the critical role of the Security Council as a preliminary reviewer must be sustained when cases pertaining to the work of the Council (whether or not under Chapter VII authority) were at issue. U.S. officials also saw the complementarity regime (deferral to willing and capable national investigations and prosecutions) as a part of the statute where necessary protection for U.S. interests could be pursued. In early 1998, U.S. negotiators pressed hard for a strengthened complementarity regime.

The U.S. delegation succeeded in its effort to broaden the complementarity regime to include a deferral to national jurisdictions at the outset of a referral of an overall situation to the ICC rather than only at a preliminary stage of the work on any particular

<sup>1</sup> See Conrad K. Harper, Remarks on Agenda Item 137, Report of the International Law Commission on the Work of its 46th Session: International Criminal Court, before the 49th Session of the United Nations General Assembly, in the Sixth Committee, USUN Press Release No. 149 (Oct. 25, 1994).

<sup>2</sup> Report of the International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. No. 10, at 44, UN Doc. A/49/10 (1994).

<sup>3</sup> William Jefferson Clinton, Remarks at the Opening of the Commemoration of "50 Years After Nuremberg: Human Rights and the Rule of Law," University of Connecticut, 1995 PUB. PAPERS 1597, 1598; Statements of President William Jefferson Clinton, at the Army Conference Room in the Pentagon, 33 WEEKLY COMP. PRES. DOC. 119 (Jan. 29, 1997); before the 52nd Session of the United Nations General Assembly, *id.* at 1389 (Sept. 22, 1997); in Honor of Human Rights Day, the Museum of Jewish Heritage, New York, *id.* at 2003 (Dec. 9, 1997); at a White House Press Briefing on Bosnia, *id.* at 2074 (Dec. 18, 1997); and William Jefferson Clinton, Remarks by the President to Genocide Survivors, Assistance Workers, and U.S. and Rwanda Government Officials, Kigali Airport, Kigali, Rwanda, 34 *id.* at 497 (Mar. 25, 1998).

case.<sup>4</sup> We also succeeded, with the help of many governments, in restructuring the procedures of the court into a more comprehensible and rational sequence of steps.<sup>5</sup> We were unsuccessful at stemming the support for the ICC prosecutor to initiate cases himself absent any referral of an overall situation by a state party or the Security Council. There was also growing opposition to any role for the Security Council in determining which situations should be referred to the court, even those situations regarding which the Council was exercising its Chapter VII responsibilities.

During the final session of the Preparatory Committee, the United States worked with other permanent members of the UN Security Council to craft acceptable language on the crime of aggression. The resulting text was reflected in the Preparatory Committee's draft as option 3.<sup>6</sup> One key to this text was the requirement, which was originally endorsed by the ILC, that the Security Council must first determine that a state has committed an act of aggression. Following such a determination, it would be essential that the individual exposed to investigation be one "who is in a position of control or capable of directing the political or military action of a State."<sup>7</sup> The United States made it clear in working on this text that a clear, precise definition along these lines was imperative. It was a significant step by the permanent members of the Security Council to present this compromise with those governments that so strongly favored the inclusion of a crime of aggression in the statute.

Much debate ensued over whether crimes against humanity would include crimes committed during an internal armed conflict and crimes occurring outside any armed conflict (such as an internal wave of massacres). The United States took the lead in advocating both of these propositions and issued a statement during the session arguing that "contemporary international law makes it clear that no war nexus for crimes against humanity is required."<sup>8</sup> We had submitted a lengthier treatment on this subject as early as March 1996.<sup>9</sup> Our strong support for a broad interpretation of crimes against humanity was instrumental in maintaining this principle in the draft text that would go to Rome.

The U.S. delegation actively participated in drafting the definitions of war crimes at the Preparatory Committee and later in Rome. Throughout the process, we were determined to include only those war crimes that qualified as such under customary international law. This objective required intensive negotiations with other delegations, some of which wanted to stretch the list of war crimes into actions that, while reprehensible, were not customary international law at the end of the twentieth century. So many issues of fundamental importance remained open in April 1998 that we could only approach Rome with "cautious optimism."

<sup>4</sup> See Proposal Submitted by the United States of America: Preliminary rulings regarding admissibility, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1998/WG.5/DP.2.

<sup>5</sup> See Reference Paper Submitted by the United States: Rules of Evidence of the International Criminal Court, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.248/1998/DP.15 (1998).

<sup>6</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1, at 12, 14 (1998).

<sup>7</sup> *Id.* at 14.

<sup>8</sup> Statement of the United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court (Mar. 23, 1998), reprinted in *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on International Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 129 (1998) [hereinafter *Senate Hearing*].

<sup>9</sup> Crimes Against Humanity: Lack of a Requirement for a Nexus to Armed Conflict (Mar. 25, 1996) (on file with the U.S. Department of State).

## U.S. OBJECTIVES FOR THE ROME TREATY

The United States pursued three main objectives. First, the United States wanted to work toward a successful conference that resulted in a treaty. Second, our responsibilities for international peace and security—shared with many others—had to be factored into the functioning of the court. Third, the United States believed that the court would not be well served by a prosecutor with the power to initiate investigations and prosecutions of crimes falling within the jurisdiction of the court, in the absence of a referral of an overall situation by either a state party to the treaty or the Security Council.<sup>10</sup>

While most governments positioned themselves within some regional or functional grouping at the Rome Conference, the United States usually had to build support for its positions through time-consuming bilateral diplomacy. The U.S. delegation worked with other delegations to achieve important U.S. objectives in the final text of the treaty. One of our major objectives was a strong complementarity regime. Article 18 (preliminary rulings regarding admissibility) is drawn from an American proposal submitted during the final session of the Preparatory Committee.<sup>11</sup> We considered it only logical that, when an investigation of an overall situation is initiated, relevant and capable national governments be given an opportunity under the principle of complementarity to take the lead in investigating their own nationals or others within their jurisdiction. Otherwise, under the original provisions on complementarity (Articles 17 and 19), the need to wait until an individual case has been investigated would have meant that national efforts would always have to defer first to ICC investigations—a delayed procedure that would undermine the willingness and ability of national judicial systems to enforce international humanitarian law. Article 18, while somewhat weaker than we had hoped, preserves the fundamental principle of complementarity from the outset of an investigation by the court.

Throughout the Rome Conference our negotiators struggled to preserve appropriate sovereign decision making in connection with obligations to cooperate with the court. There was a temptation on the part of some delegates to require unqualified cooperation by states parties with all court orders, notwithstanding national judicial procedures that would be involved in any event. Such obligations of unqualified cooperation were unrealistic and would have raised serious constitutional issues not only in the United States but in many other jurisdictions. Governments would respect the court's orders provided the court respected reasonable national judicial procedures to comply with those orders. Part 9 of the statute represents hard-fought battles in this respect. The requirement that the actions of state parties be taken "in accordance with national procedural law" or similar language is pragmatic and legally essential for the successful operation of the court.

Article 72 (Protection of national security information) raised issues of particular concern to the United States. Our experience with the International Criminal Tribunal for the former Yugoslavia (ICTY) showed that some sensitive information collected by the U.S. Government could be made available as lead evidence to the prosecutor, provided that detailed procedures were strictly followed.<sup>12</sup> We applied years of experience with the ICTY to the challenge of similar cooperation with a permanent court. It was not easy. Some delegations argued that the court should have the final determination on

<sup>10</sup> See *The Concerns of the United States Regarding the Proposal for a Proprio Motu Prosecutor*, in *Senate Hearing, supra* note 8, at 147.

<sup>11</sup> See note 4 *supra*. For a further refinement of this proposal, see UN Doc. A/CONF.183/C.1/L.25 (1998).

<sup>12</sup> See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of former Yugoslavia since 1991, Rules of Procedure and Evidence, as revised, Art. 72, UN Doc. IT/32/Rev.13 (1998) (originally adopted Feb. 11, 1994).

the release of all national security information requested from a government. Our view prevailed: a national government must have the right of final refusal if the request pertains to its national security pursuant to Article 93(4). In the case of a government's refusal, the court may seek a remedy from the Assembly of States Parties or the Security Council pursuant to Article 87(7).

The United States helped lead the successful effort to ensure that the ICC's jurisdiction over crimes against humanity included acts in internal armed conflicts and acts in the absence of armed conflict. We also argued successfully that there had to be a reasonably high threshold for such crimes. This was achieved with the language in Article 7 that crimes against humanity means any one of a number of listed acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," and that such conduct must involve the multiple commission of such acts against any civilian population pursuant to or in furtherance of a state or organizational policy to commit such an attack. In the Preparatory Committee we had also introduced the definitions for most of the particular crimes against humanity, which, following much negotiation in Rome, were set forth in Article 7(2).

The United States had long sought a high threshold for the court's jurisdiction over war crimes, since individual soldiers often commit isolated war crimes that by themselves should not automatically trigger the massive machinery of the ICC. An appropriately structured ICC should prosecute significant criminal activity during wartime but should leave to national jurisdictions the job of disciplining the isolated war crimes committed by errant soldiers. While the United States sought a clearer definition setting a high threshold for war crimes, we believe the definition arrived at in Article 8(1) serves our purposes well: "The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes."

U.S. lawyers insisted that definitions of war crimes be drawn from customary international law and that they respect the requirements of military objectives during combat and of requisite intent.

A major achievement of Article 8 of the treaty is its application to war crimes committed during internal armed conflicts. The United States helped lead the effort to ensure that internal armed conflicts were covered by the statute. Although some delegations sought during the Preparatory Committee sessions and in Rome to stack Article 8(2)(e) with most, if not all, of the crimes applicable to international armed conflict as listed in Article 8(2)(b), most agreed that customary international law has developed to a more limited extent with respect to internal armed conflicts. Article 8(2)(e) now reflects that agreement. Also, in order to widen acceptance of application of the statute to war crimes committed during internal armed conflicts, the United States helped broker language that, *inter alia*, excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature.<sup>13</sup>

One of the more difficult, but essential, issues to negotiate was the coverage of crimes against women, in particular either as a crime against humanity or as a war crime. The U.S. delegation, aided by the advice of experts in the NGO community, fought hard during the final sessions of the Preparatory Committee and again in Rome to include explicit reference to crimes relating to sexual assault in the text of the statute. In the end,

<sup>13</sup> Rome Statute of the International Criminal Court, July 17, 1998, Arts. 8(2)(d), 8(2)(f), 8(3), UN Doc. A/CCNF.183/9\* <[www.un.org/icc](http://www.un.org/icc)>, reprinted in 37 ILM 999 (1998).

rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of significant magnitude were included as crimes against humanity (Article 7(1)(g)) and war crimes (Article 8(2)(b)(xxii) and (e)(vi)). In exchange, language acceptable to all delegations was also negotiated to properly define "forced pregnancy" (Article 7(2)(f)) and "gender" (Article 7(3)).

During the final session of the Preparatory Committee, the U.S. delegation stressed the importance of elements of crimes to provide greater specificity and guidance for the ICC prosecutor and for defense counsel. At first, we waged a lonely struggle to incorporate elements of crimes into the treaty. The United States submitted the first and only draft of elements of crimes.<sup>14</sup> We succeeded in Rome in requiring the preparation of the "Elements of Crimes" as set forth in Article 9 of the treaty. The U.S. draft should serve as a useful starting point for further work on the Elements of Crimes during the Preparatory Commission. We were also instrumental in establishing the necessity of arriving at acceptable definitions of command responsibility (Article 28) and the defense of superior orders (Article 33).

Due process protections occupied an enormous amount of the U.S. delegation's efforts. We had to satisfy ourselves that U.S. constitutional requirements would be met with respect to the rights of defendants before the court. Parts 5–8 of the treaty contain provisions advocated by the U.S. delegation to preserve the rights of the defendant and establish the limits of the prosecutor's authority.

Other U.S. contributions of major significance to the structure of the court included our position that the expenses of the court and of the Assembly of States Parties be provided through assessed contributions made by states parties to the ICC treaty. We objected to the widely supported proposition that the court and Assembly of States Parties should be funded through the regular UN budget. The fact that the UN budget is under enormous pressure for other reasons, and the belief that member states of the United Nations that are not party to the ICC treaty should not be responsible for its financing, were compelling reasons for a self-financing institution. Nonetheless, we agreed that the expenses incurred because of referrals to the court by the Security Council could be sought from the United Nations, subject to the General Assembly's approval. The question of interim funding from the UN budget—which the United States opposes—was left for resolution at a later stage.

#### FLAWS IN THE ROME TREATY

These accomplishments in negotiating the Rome treaty were significant. But the U.S. delegation was not prepared at any time during the Rome Conference to accept a treaty text that represented a political compromise on fundamental issues of international criminal law and international peace and security. We could not negotiate as if certain risks could be easily dismissed or certain procedures of the permanent court would be infallible. We could not bargain away our security or our faith in basic principles of international law even if our closest allies reached their own level of satisfaction with the final treaty text. The United States made compromises throughout the Rome process, but we always emphasized that the issue of jurisdiction had to be resolved satisfactorily or else the entire treaty and the integrity of the court would be imperiled.

The theory of universal jurisdiction for genocide, crimes against humanity and war crimes seized the imagination of many delegates negotiating the ICC treaty. They

<sup>14</sup> Proposal Submitted by the United States of America: Elements of Offenses for the International Criminal Court, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1998/DP.11 (1998).

appeared to believe that the ICC should be empowered to do what some national governments have done unilaterally, namely, to enact laws that empower their courts to prosecute any individuals, including non-nationals, who commit one or more of these crimes. Some governments have enacted such laws, which theoretically, but rarely in practice, make their courts arenas for international prosecutions. Of course, the catch for any national government seeking to exercise universal jurisdiction is to exercise personal jurisdiction over the suspect. Without custody, or the prospect of it through an extradition proceeding, a national court's claim of universal jurisdiction necessarily and rightly is limited.

The ICC is designed as a treaty-based court with the unique power to prosecute and sentence individuals, but also to impose obligations of cooperation upon the contracting states. A fundamental principle of international treaty law is that only states that are party to a treaty should be bound by its terms.<sup>15</sup> Yet Article 12 of the ICC treaty reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over the nationals of a nonparty state. Under Article 12, the ICC may exercise such jurisdiction over anyone anywhere in the world, even in the absence of a referral by the Security Council, if either the state of the territory where the crime was committed or the state of nationality of the accused consents. Ironically, the treaty exposes nonparties in ways that parties are not exposed.

Why is the United States so concerned about the status of nonparty states under the ICC treaty? Why not, as many have suggested, simply sign and ratify the treaty and thus eliminate the problem of nonparty status for the United States? First, fundamental principles of treaty law still matter and we are loath to ignore them with respect to any state's obligations vis-à-vis a treaty regime. While certain conduct is prohibited under customary international law and might be the object of universal jurisdiction by a national court, the establishment of, and a state's participation in, an international criminal court are not derived from custom but, rather, from the requirements of treaty law.

Second, even if the Clinton administration were in a position to sign the treaty, U.S. ratification could take many years and stretch beyond the date of entry into force of the treaty. Thus, the United States would likely have nonparty status under the ICC treaty for a significant period of time. The crimes within the court's jurisdiction also go beyond those arguably covered by universal jurisdiction, and court decisions or future amendments could effectively create "new" and unacceptable crimes. Moreover, the ability to withdraw from the treaty, should the court develop in unacceptable ways, would be negated as an effective protection.

It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize. No other country, not even our closest military allies, has anywhere near as many troops and military assets deployed globally as does the United States. The theory that an individual U.S. soldier acting on foreign territory should be exposed to ICC jurisdiction if his alleged crime occurs on that territory, even if the United States is not party to the ICC treaty and even if that foreign state is also not a party to the treaty but consents ad hoc to ICC jurisdiction, may appeal to those who believe in the blind application of territorial jurisdiction. But the terms of Article 12 could render nonsensical the actual functioning of the ICC.

<sup>15</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Arts. 34–38, 1155 UNTS 331.



The complementarity regime is often offered as the solution to this jurisdictional dilemma. However, complementarity is not a complete answer, to the extent that it involves compelling states (particularly those not yet party to the treaty) to investigate the legality of humanitarian interventions or peacekeeping operations that they already regard as valid official actions to enforce international law. Even if the United States has conducted an investigation, again as a nonparty to the treaty, the court could decide there was no genuine investigation by a 2-to-1 vote and then launch its own investigation of U.S. citizens, notwithstanding that the U.S. Government is not obligated to cooperate with the ICC because the United States has not ratified the treaty.

Equally troubling are the implications of Article 12 for the future willingness of the United States and other governments to take significant risks to intervene in foreign lands in order to save human lives or to restore international or regional peace and security. The illogical consequence imposed by Article 12, particularly for nonparties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions, which up to this point have been mostly shielded from politically motivated charges.

During the Rome Conference, the U.S. delegation proposed a structure for jurisdiction that would have greatly enhanced the prospects of U.S. support for and actual participation in the treaty. Our proposal stemmed from the very poor prospects of gaining sufficient support for a desire to work toward a solution with those who disagreed with our long-standing proposal on how referrals to the court should be initially handled. Consequently, we believed it essential that the original "opt-out" concept proposed by the International Law Commission in 1994 be resurrected for crimes against humanity and war crimes. We were prepared to accept the automatic jurisdiction of the ICC over genocide. But to broaden participation in the ICC and to permit governments to adjust over time to its potentially wide-ranging jurisdiction, a state party in our view should be entitled to limit its exposure to the court unless, of course, the Security Council referred a situation to the ICC under its Chapter VII powers. We were also prepared to deny any state party that so chose to "opt out" of either of the two categories of crimes the privilege of being able to refer matters to the court. This would prevent a rogue state from joining the court, opting out of crimes against humanity and/or war crimes, and then using the court to launch politically motivated charges against other governments. Twenty-two delegations openly expressed support for this approach, emphasizing that it was essential to ensure universal and early acceptance of the court.

The U.S. delegation found, however, that opposition to an open-ended right of opting out was so great that another way had to be found if there was to be a prospect of U.S. participation in the court. During the final week of the Rome Conference, the delegations of the Governments of the five permanent members of the Security Council (the United States, Russia, France, the United Kingdom, and China—also known as the P-5) met intensively to arrive at a compromise package that could be presented to the conference. We arrived at a joint proposal that would permit a ten-year transitional period following entry into force of the treaty during which any state party could opt out of the court's jurisdiction over crimes against humanity or war crimes. The opt-out privilege would expire at the end of the ten-year period but could be extended through certain arrangements if there were general agreement. All states parties would be subject to the automatic jurisdiction of the court over the crime of genocide. The proposal would also shield nonparty states from the court's jurisdiction unless the Security Council

were to decide otherwise. The P-5 compromise was rejected by the like-minded group of countries and failed to garner other necessary support.

The U.S. delegation also offered a fresh approach to the court's jurisdiction over any particular crime. We proposed that Article 12 be drafted either (1) to require the express approval of both the territorial state of the alleged crime *and* the state of nationality of the alleged perpetrator in the event either was not a party to the treaty,<sup>16</sup> or (2) to exempt from the court's jurisdiction conduct that arises from the official actions of a nonparty state acknowledged as such by the nonparty.<sup>17</sup> The former proposal recognized the large degree of support at the conference for the consent of the territorial state, but also remedied the dangerous drift of Article 12 toward universal jurisdiction over nonparty states. The latter proposal would require a nonparty state to acknowledge responsibility for an atrocity in order to be exempted, an unlikely occurrence for those who usually commit genocide or other heinous crimes. In contrast, the United States would not hesitate to acknowledge that humanitarian interventions, peacekeeping actions, or defensive actions to eliminate weapons of mass destruction are "official state actions."<sup>18</sup> Regrettably, our proposed amendments to Article 12 were rejected on the premise that the proposed package was so fragile that, if any part were reopened, the conference would all fall apart.

The process launched in the final forty-eight hours of the Rome Conference minimized the chances that these proposals and amendments to the text that the U.S. delegation had submitted in good faith could be seriously considered by delegations. The treaty text was subjected to a mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the like-minded group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 A.M. on the final day of the conference, July 17. Even portions of the statute that had been adopted by the Committee of the Whole were rewritten. This "take it or leave it" text for a permanent institution of law was not subjected to the rigorous review of the Drafting Committee or the Committee of the Whole and was rushed to adoption hours later on the evening of July 17 without debate.

Thus, on the final day of the conference, delegates were presented with issues and provisions in the treaty text that were highly objectionable to some of us. Some provisions had never once been openly considered. No one had time to undertake a rigorous line-by-line review of the final text.<sup>19</sup> Under the treaty's final terms, nonparty states would be subjected to the jurisdiction of the court not only under Article 12 in the commencement of investigations, but also under Article 121(5), the amendments clause. In its present form, which could not possibly have been contemplated by the delegates, the amendment process for the addition of new crimes to the jurisdiction of the court or revisions to the definitions of existing crimes in the treaty will entail an extraordinary and unacceptable consequence. After the states parties decide to add a new crime or change the definition of an existing crime, any state that is a party to the treaty can decide to immunize its nationals from prosecution for the new or amended crime. Nationals of nonparties, however, are subject to potential prosecution. For a criminal court, this is an indefensible overreach of jurisdiction.

<sup>16</sup> JN Doc. A/CONF.183/C.1/L.70 (1998).

<sup>17</sup> JN Doc. A/CONF.183/C.1/L.90 (1998).

<sup>18</sup> An interesting perspective can be found in Theodor Meron, *The Court We Want*, WASH. POST, Oct. 13, 1998, at A25.

<sup>19</sup> At a minimum, this led to an unusually high number of technical errors that were corrected by another objectionable procedure activated by the UN Legal Counsel. See Proposed Corrections to the Rome Statute of the International Criminal Court, UN Doc. C.N.502.1998.TREATIES-3 (Annex).

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The final text of the treaty also includes the crime of aggression, a surprise to the United States and other governments that had struggled so hard to define it only to reach an impasse during the Rome Conference. The failure to reach a consensus definition should have required its removal from the final text. Instead, the crime appears in Article 5 as a prospective crime within the court's jurisdiction once it is defined. This political concession to the most persistent advocates of a crime of aggression without a definition and without the linkage to a prior Security Council determination that an act of aggression has occurred deeply concerns the United States. The future definition that may be sought for this crime, and ultimately determined, if at all, only by the states parties through an amendment to the treaty, could be without limit and call into question any use of military force or even economic sanctions. Having participated in years of discussion about aggression in the Ad Hoc and Preparatory Committees and the Rome Conference, I know how easily the exercise can be used to strangle legitimate uses of military force and to do so by targeting individuals. This issue alone could fatally compromise the IGC's future credibility.

A better course would have been to suspend the Rome Conference and reconvene it in September or October 1998 so that these final problems could be further negotiated. The United States would then have been better positioned to support a treaty text emerging from a more thoughtful, transparent and disciplined process of final drafting. Other delegations shared this view with regard to the need to consider some difficult issues carefully. Many complex international treaties and political negotiations have benefited from such extensions, sometimes for only a few days, other times for a number of months. Particularly where the object of the exercise was a permanent institution of such enormous significance for the future, more time was warranted. But our efforts in this regard were unsuccessful.

On July 17, I spent the entire day consulting with a large number of governments and explaining that the opportunity still existed to seek reasonable modifications to the bureau's final text. But the momentum of waning time swept over our final efforts. The failure of the Committee of the Whole to consider the U.S., or any, amendments of the text, left us with no choice but to call for a vote on the statute in the plenary session later that night. The United States voted against motions in both bodies to adopt the bureau's final text.

Having considered the matter with great care, the United States will not sign the treaty in its present form. While we firmly believe that the true intent of national governments cannot be that which now appears reflected in a few key provisions of the Rome treaty, the political will remains within the Clinton administration to support a treaty that is fairly and realistically constituted. On December 8, 1998, the United States joined a consensus in the UN General Assembly to adopt a resolution that authorizes the work of the Preparatory Commission in 1999.<sup>20</sup> The next step for the United States will be to discuss with other governments our fundamental concerns about the Rome treaty, many of which have been identified in this report. We believe that these and other problems concerning the Rome treaty are solvable.

<sup>20</sup> See David J. Scheffer, Statement on the International Criminal Court, Remarks Before the 53rd Session of the United Nations General Assembly, in the Sixth Committee, USUN Press Release No. 179 (Oct. 21, 1998), and Statement of the United States before the UN General Assembly (Dec. 8, 1998) (on file with the State Department).

The United States remains strongly committed to the achievement of international justice. We hope developments will unfold in the future so that the considerable support that the United States could bring to a properly constituted international criminal court can be realized.

DAVID J. SCHEFFER\*

## THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) took place in Rome at the headquarters of the Food and Agriculture Organization from June 15 to July 17, 1998. The participants numbered 160 states, thirty-three intergovernmental organizations and a coalition of 236 nongovernmental organizations (NGOs). The conference concluded by adopting the Rome Statute of the International Criminal Court by a nonrecorded vote of 120 in favor, 7 against and 21 abstentions. The United States elected to indicate publicly that it had voted against the statute. France, the United Kingdom and the Russian Federation supported the statute.

### I. THE NEGOTIATING PROCESS

The Rome Conference was the culmination of a negotiating process that began in 1948 with a request by the General Assembly to the International Law Commission to address the establishment of an international criminal court.<sup>1</sup> In 1993 the Assembly asked the Commission to elaborate a draft statute for such a court as a matter of priority.<sup>2</sup> The Commission completed its draft in 1994.<sup>3</sup> In the same year, the General Assembly established an Ad Hoc Committee to review the major substantive and administrative issues arising out of the Commission's draft statute.<sup>4</sup> The Ad Hoc Committee was followed by a Preparatory Committee, which met in 1996, 1997 and finally in 1998, completing its work in April. While the negotiating process in the Ad Hoc Committee was of a general nature and focused on the core issue of whether the proposition to create a court was serious and viable, the discussions at the phase of the Preparatory Committee focused squarely on the text of the court's statute.<sup>5</sup>

The working text that the Preparatory Committee submitted to the Rome Conference<sup>6</sup> contained 116 articles, some of which were several pages long, with many options and hundreds of square brackets. Not only were the texts of most of the articles raw, but key policy issues about the jurisdiction and operation of the court had not yet been resolved.

\* U.S. Ambassador-at-Large for War Crimes Issues. Ambassador Scheffer led the U.S. delegation to the Rome Conference.

<sup>1</sup> GA Res. 44/39, UN GAOR, 44th Sess., Supp. No. 49, at 311, UN Doc. A/44/49 (1989). The revival of the idea of establishing an international criminal court was initiated by Trinidad and Tobago in 1989 in connection with illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities. See Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the Secretary-General, UN GAOR, 44th Sess., Annex 44, Agenda Item 152, UN Doc. A/44/195 (1989).

<sup>2</sup> GA Res. 47/33, UN GAOR, 47th Sess., Supp. No. 49, at 287, UN Doc. A/47/49 (1992); and GA Res. 48/31, UN GAOR, 48th Sess., Supp. No. 49, at 328, UN Doc. A/48/49 (1993).

<sup>3</sup> See Report of the International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. No. 10, at 44, UN Doc. A/49/10 (1994).

<sup>4</sup> GA Res. 49/53, UN GAOR, 49th Sess., Supp. No. 49, at 239, UN Doc. A/49/49 (1994).

<sup>5</sup> For a record of the discussions in the Preparatory Committee, see the series of reports by Christopher Keith Hall in 91 AJIL 177 (1997), and 92 AJIL 124, 331, and 548 (1998).

<sup>6</sup> UN Doc. A/CONF.183/2/Add.1 (1998).

At the Preparatory Committee, it became clear that the statute involved many areas of international and criminal law such as international humanitarian law, criminal procedure, extradition and human rights. Moreover, many of these areas touched on sensitive political issues relating to the UN Charter and the competence of the Security Council. To avoid a long negotiating process similar to that of the Third UN Conference on the Law of Sea, the Preparatory Committee divided the statute by subject matter into sections, allocating each subject to a working group. The working groups reported back to the plenary of the Preparatory Committee at the end of each of the committee's sessions, and the task of coordination among the different sections of the statute was primarily left to the coordinators.

The negotiating process at the Rome Conference was modeled on that of the Preparatory Committee. The thirteen parts of the draft statute were divided among different working groups of the Committee of the Whole, which was ultimately responsible for negotiating the statute as a whole. The coordinators and the Bureau of the Committee of the Whole became crucial in the last two weeks of the conference. They provided advice on the technical questions of coordination between different parts and articles of the statute, but even more important, were a strong, knowledgeable and dedicated negotiating team available to assist the chairman of the Committee of the Whole, as he struggled to assemble a package containing compromises on various aspects of the statute that would make it acceptable to an overwhelming majority of the participating states, including three permanent members of the Security Council.

Parallel to the many working groups and informal consultations, discussions were conducted among political and regional groups, such as the Non-Aligned Movement, the Arab Group, the Latin American and Caribbean Group, the European Union, the Western Europeans and others, and the "like-minded states." The last group, comprising approximately fifty-four states, played a significant role at the Preparatory Committee and the Rome Conference. It had been formed during the preparatory work of the Ad Hoc Committee by a handful of Western European and Latin American states that were frustrated by the opposition of the major powers to the establishment of the ICC. The group, which quickly grew in numbers and soon included states from different regions, organized itself as an effective and resourceful negotiating force. After the Labour Party's victory in the British elections, the United Kingdom joined the like-minded states. That was the first break in the ranks of the permanent members of the Security Council and it proved to be an important step in the negotiation of the statute. While the like-minded states did not agree on every issue, they were committed, as a group, to the success of the Rome Conference and the creation of the court.

Nongovernmental organizations played a significant role in the negotiation process at the Preparatory Committee and the conference. From the beginning, a large group of NGOs committed themselves to the establishment of the ICC and lobbied intensively. Their influence was felt on a variety of issues, particularly the protection of children, sexual violence, forced pregnancy, enforced sterilization and an independent role for the prosecutor. Throughout the Preparatory Committee's sessions and the Rome Conference, they provided briefings and legal memoranda for sympathetic delegations, approached delegations to discuss their points of view, and even assigned legal interns to small delegations. On occasion, they increased pressure on unsympathetic delegations by listing them as such in the media.

Two chairpersons, each with a different, but equally effective negotiating style, guided the negotiation of the statute. The Ad Hoc and Preparatory Committees were chaired by Adriaan Bos, the Legal Adviser of the Ministry of Foreign Affairs of the Netherlands. He became ill a few weeks before the Rome Conference and was replaced by Philippe Kirsch, Legal Adviser of the Department of Foreign Affairs of Canada, as the chairman of the

Committee of the Whole.<sup>7</sup> Bos's style, incorporating the most detailed understanding of the positions of various governments and the political dynamics behind them, was reassuring and deliberate, a technique that was useful in keeping all sides engaged during the early phases of the negotiations. Kirsch is a consummate international parliamentarian, and his style is swift and creative in the formation of consensus. He was animated by a determination to assemble a final package by maintaining a consistent focus and negotiating both bilaterally and multilaterally. This style proved to be crucial in forging compromise texts for the statute. Both Bos and Kirsch relied on and effectively used the bureau and the coordinators of different parts of the statute.

## II. THE STRUCTURE OF THE STATUTE

The Statute<sup>8</sup> is composed of a preamble and thirteen parts, including 128 articles.<sup>9</sup> Its structure remained unchanged from the one proposed by the Preparatory Committee. This structure had been assembled by the bureau and coordinators of the Preparatory Committee in a January 1998 meeting held in Zutphen, the Netherlands, when the theretofore disorganized articles were read from first to last, reshuffled, and given a form with parts and sequentially numbered articles.<sup>10</sup> The statute was deliberately not patterned after the Statute of the International Court of Justice.<sup>11</sup> The reason was concern for ratification. National legislatures, it was assumed, are more interested in the jurisdiction of the court than in such matters as its organization, the election of judges and their salaries. Hence, the jurisdictional section precedes the others. Neither the Preparatory Committee nor the Rome Conference reconsidered the structure of the statute.<sup>12</sup>

Three principles underlie the statute. The first, the principle of complementarity, establishes that the court may assume jurisdiction only when national legal systems are unable or unwilling to exercise jurisdiction. Thus, in cases of concurrent jurisdiction between national courts and the international criminal court, the former, in principle, have priority.<sup>13</sup> The ICC is not intended to replace national courts, but operates only

<sup>7</sup> An account of the negotiating process at the Rome Conference by Mr. Kirsch and John T. Holmes appears *supra* at p. 2.

<sup>8</sup> After its adoption, the statute was found to contain a number of technical and typographical errors. In accordance with established practice, the depositary circulated a note to governments, correcting the statute.

<sup>9</sup> For the text, see Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9\* <[www.un.org/icc](http://www.un.org/icc)>, reprinted in 37 ILM 999 (1998) [hereinafter ICC statute].

UN Doc. A/AC.249/1998/L.13 (1998).

The first chapter of the Statute of the International Court of Justice begins with the organization of the Court and the jurisdiction of the Court begins with Article 34 as chapter 2.

Partly owing to time constraints, the International Law Commission's approach to the draft statute was to prepare a slim statute dealing with the essentials. The Commission also set aside the question of substantive criminal law and criminal procedure in the belief that the definition of crimes and other substantive criminal law were addressed in another topic before it, the draft Code of Crimes against the Peace and Security of Mankind. In addition, the Commission took the view that rules of criminal procedure will be covered in a separate document that will be prepared by the judges of the court. The General Assembly's Sixth Committee, however, after receiving the Commission's report, took a different position. It preferred a more elaborated statute that would leave less to interpretation by judges. It also preferred to separate the statute from the project on the draft code and decided that states and not judges should write the articles dealing with procedure. As a result, the statute grew substantially in size. At the latter phases of the preparatory negotiations, a sentiment formed that it would have been preferable to move some of the provisions of the statute, particularly those dealing with procedural issues, to the Rules of Procedure and Evidence and address them in only a general fashion in the statute.

This is one of the important differences between the ICC and the two ad hoc Tribunals on the former Yugoslavia and Rwanda. Under Article 9 of the Statute of the Yugoslav Tribunal and Article 8 of that of the Rwanda Tribunal, in case of concurrent jurisdiction by the Tribunals and national courts, the Tribunals have primacy over national courts.

The original request for the establishment of an international criminal court, Trinidad and Tobago's concern was the inadequacy of national criminal laws and jurisdiction to deal with drug trafficking. See Letter

when they do not. The understanding of the majority of participating states was that states had a vital interest in remaining responsible and accountable for prosecuting violations of their laws. The international community had a comparable interest, inasmuch as national systems are expected to maintain and enforce adherence to international standards. The principle of complementarity was referred to in the preamble to the draft statute prepared by the International Law Commission; in the final Rome text, in addition to the preamble, it also found its way into Articles 1 and 17–19. The second principle is that the statute is designed to deal only with the most serious crimes of concern to the international community as a whole. This principle affected the selection of crimes, as well as the determination of their threshold of application. It was hoped that this principle would promote broad acceptance of the court by states and consequently enhance its credibility, moral authority and effectiveness. In addition, it would avoid overloading the court with cases that could be dealt with adequately by national courts, at the same time limiting the financial burden imposed on the international community. The selection of crimes was also related to the court's future role. Limiting the court's competence to a few "core crimes" would facilitate designing a coherent and unified approach to the exercise of jurisdiction and the requisite state cooperation. The third principle was that the statute should, to the extent possible, remain within the realm of customary international law. The reason for this approach was to make the statute widely acceptable. The proper place for adopting this approach was in the definition of crimes. With the exception of a few articles dealing with individual criminal responsibility, this principle could not have been applied to other provisions of the statute. Even in the provisions on defining crimes, there are matters that were not "international customary law," but had substantial, and in some cases overwhelming, support from the negotiating states. Conscious efforts were also made to harmonize the general principles of criminal law and rules of procedure of the common law and civil law systems in many of the articles in parts 3, 5, 6, and 8. As a result, the provisions dealing with general principles and procedural issues are a hybrid of the common and the civil law. For example, while the adversarial character of trials is maintained, judges are assigned much broader competence in matters dealing with investigation and the questioning of witnesses.

Part 1, Establishment of the Court, comprises four articles dealing with the creation of the court. Article 1 expresses four cardinal points: the court is a standing institution; it is complementary to national criminal jurisdictions; it is intended to adjudicate the most serious crimes of international concern; and it is to exercise jurisdiction over persons and not legal entities. The last issue is reinforced by Article 25(1), which provides that the court has jurisdiction over "natural persons." The seat of the court is The Hague (Article 3).

Part 2, Jurisdiction, Admissibility and Applicable Law, composed of seventeen articles (Articles 5–21), is the heart of the statute and was the most difficult to negotiate. This part deals with the list and the definition of crimes, the trigger mechanism, admissibility and applicable law. The text of part 2 was negotiated until the penultimate day of the conference.

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from the Permanent Representative of Trinidad and Tobago, *supra* note.1. Some of the concerns of smaller states were that, in relation to certain crimes such as drug trafficking and terrorism, the fragile national courts could not withstand the power and terror that those involved in such activities could bring about, which could destabilize even governments themselves. An international criminal court could replace national courts on such prosecutions and remove the pressure from those courts. This idea was not acceptable to the great majority of the states negotiating the statute.

### III. JURISDICTION

Articles 12-19 deal with the jurisdiction of the court, the trigger mechanism and admissibility. Jurisdiction has a broad meaning in the statute and includes the competence of the prosecutor to investigate. The great majority of states wanted the court to have automatic jurisdiction regarding genocide, crimes against humanity, war crimes and the crime of aggression. A few states, including the United States, wanted automatic jurisdiction only for genocide. For other crimes, they preferred some form of a consent regime: either opting in or opting out, or consent on individual cases. The final text provides that the court may exercise jurisdiction with respect to the crimes listed in the statute, if it has the consent of the state of the territory where the crime was committed or the consent of the state of nationality of the accused (Article 12). But this requirement does not apply if a situation is referred to the court by the Security Council; the court will have jurisdiction regarding the crimes concerned even if committed in non-states parties by nationals of non-states parties and in the absence of consent by the territorial state or the state of nationality of the accused.

The requirement of consent by the state of nationality of the accused was strongly supported by the United States as a key condition for the court's jurisdiction. In the U.S. view, Article 12 is inconsistent with treaty practice, for it would enable the court to exercise jurisdiction over a national of a non-state party if the state where the crime was committed had consented to the court's jurisdiction. Hence, the statute purports to establish an arrangement whereby U.S. armed forces operating overseas could conceivably be prosecuted by the ICC even if the United States had not agreed to be bound by the treaty. The United States took the position that such overreaching by the ICC could inhibit the United States from using its military to meet alliance obligations and to participate in multinational operations, including humanitarian interventions to save civilian lives.

The overwhelming majority of states, however, could not agree to requiring the consent of the state of the nationality of the accused as a prerequisite for the court's jurisdiction for, in their view, it would paralyze the court. They also found it difficult to accept a situation, in terms of public policy, in which the nationals of a state party to the statute could be prosecuted for crimes committed in that state, while non-nationals of that state, committing the same crime in its territory, would be free from prosecution because their state of nationality was not party to the statute. These concerns, also shared by the United States, are partly addressed in the article dealing with admissibility and the primacy of national courts. In addition, the articles on judicial cooperation take into account the special situations of guest armed forces and require the consent of the state of nationality of the guest forces as a precondition to their release to the court by the host state. On the last day of the conference, the United States proposed another formula for jurisdiction. Under this formula, if the state of nationality of the accused declared that the accused had committed the crime in the pursuit of an official duty, the court would be precluded from exercising jurisdiction. Thus, a question of individual criminal responsibility would become one of state responsibility and would have to be addressed not under the statute, but under general international law. This proposal was not accepted.

One concern throughout the negotiations, expressed mostly by the permanent members of the Security Council, was the possibility of conflict between the jurisdiction of the court and the functions of the Council. There may be situations in which the investigation or prosecution of a particular case by the court could interfere with the resolution of an ongoing conflict by the Council. Hence the proposal for a provision that would automatically exclude the court's jurisdiction over any situation under consideration by



the Council. Many states found the proposal too sweeping and feared it would undermine the court, for situations could remain pending before the Council indefinitely without its taking any final or serious action. A compromise formula was finally reached, which provided that the Security Council, acting under Chapter VII of the UN Charter, could adopt a resolution requesting deferral of an investigation or prosecution for a period of twelve months and that such a request could be renewed at twelve-month intervals (Article 16).

Under the statute, the court must satisfy itself that it has jurisdiction in any case brought before it (Article 19). Its jurisdiction is not retroactive to crimes committed before the entry into force of the statute. Even after that date, the court may exercise jurisdiction only with respect to a crime committed after the statute has entered into force for the state in question, unless that state agrees otherwise (Article 11). Since the court may only exercise jurisdiction if either the state where the crime was committed or the state of nationality of the accused is party to the statute or has consented to the court's jurisdiction, the application of this provision may not always be guaranteed.

A state party or the Security Council, acting under Chapter VII, may refer a "situation" to the Court (Article 13). The word "situation" is intended to minimize politicization of the court by naming individuals. The prosecutor may also initiate an investigation *proprio motu* subject to authorization by the pretrial chamber (Article 15). This power of the prosecutor was strenuously objected to by some states on the ground that the office might be overwhelmed by frivolous complaints and would have to waste the limited resources at his or her disposal to attend to them. In addition, concerns were expressed that the prosecutor might be placed under political pressure to bring a complaint even if the complaint might not be justifiable or helpful in a particular political context. But a majority of states were of the view that, despite the potential for waste and abuse, it was better to empower the prosecutor with such independence. In addition, they argued that the pretrial chamber will have broad competence with regard to the power of the prosecutor to use his or her own initiative and will be able to bar abuse. The NGOs strongly lobbied for this feature.

Where a situation has been referred by a state or the prosecutor has initiated a case *proprio motu*, the prosecutor must inform all states parties to the statute, as well as non-states parties that would normally exercise jurisdiction over the crimes concerned (Article 18). This provision was proposed by the United States. Many states accepted the article with great reluctance and as a compromise necessary for securing the prosecutor's power to bring a case on his or her own initiative. The prosecutor would have to defer to the state's investigation unless the pretrial chamber decided otherwise. Once having deferred an investigation to a state, the prosecutor may request that the state periodically inform him or her of the progress of its investigation. In addition, the prosecutor may review a state's investigation six months after the date of deferral or at any time when there has been a significant change of circumstances indicating the state's unwillingness or inability genuinely to carry out the investigation.

The court's complementary character to national jurisdictions is most clearly manifested in the provision dealing with admissibility. Article 17 on admissibility does something rather unusual in treaty practice. It refers to paragraph 10 of the preamble in addition to Article 1, which addresses the complementary character of the ICC with respect to national courts. It then identifies four grounds of inadmissibility: (1) the case is being investigated or prosecuted by a state that has jurisdiction over it; (2) the case has been investigated by a state that has jurisdiction over it and the state has decided not to prosecute the person concerned; (3) the person concerned has already been tried for the conduct in question; and (4) the case is not of sufficient gravity to justify action by the court. The first three grounds for inadmissibility, however, are subject to specific

limitations: that the state is unwilling or unable genuinely to carry out the investigation or prosecution; that the national prosecution was conducted for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC's jurisdiction; or that the national prosecution was not conducted independently or impartially in accordance with the norms of due process recognized by international law and lacked a meaningful intent to bring the person concerned to justice. Paragraphs 2 and 3 of Article 17 provide guidelines on how to determine the "unwillingness" or "inability" of a state to conduct an investigation or prosecution. These were thorny issues that were skillfully negotiated by Canada during the negotiations in the Preparatory Committee.

The statute does not give any priority of jurisdiction to the court as against national courts, even if a matter is referred to it by the Security Council. Article 17 on admissibility and Article 90 on the obligation of the third state regarding competing requests by the court and by another state do not accord any priority to the court if the matter was referred to it by the Council. Thus, in such cases (when a situation has been referred to the court by the Security Council), national jurisdictions will still have priority over the court, if they meet the exceptions under Article 17. This result is not fully consistent with the original intention of empowering the Security Council with the right of referral, which was to avoid the creation of ad hoc tribunals.<sup>14</sup>

The court's jurisdiction may be challenged by an accused; by the state that has jurisdiction over the case on the ground that it is investigating or prosecuting the matter or has investigated or prosecuted it; or by the state in whose territory the crime was committed or the state of nationality of the accused, whose consent to the court's jurisdiction is required (Article 19). In principle, a challenge to jurisdiction may be brought only once at the beginning of the trial.

The statute prescribes a strict hierarchy among the rules of law to be applied by the court (Article 21). It must first apply the statute, the "Elements of Crimes" and its Rules of Procedure and Evidence. The Elements of Crimes must be read together with Article 9, in which they are included, so as to assist the court in the interpretation and application of articles on the definition of crimes. Second, the court must apply relevant "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict." The latter phrase was intended to include the *jus in bello*. In the third place, the court shall apply general principles of law that it has derived from the national laws of legal systems of the world including, as appropriate, the laws of the states that would normally have exercised jurisdiction over the case so long as they are consistent with the statute and international law. In addition to this hierarchy, the court *may* draw on its own jurisprudence from previous cases.

Even though the three categories were inspired by Article 38 of the Statute of the International Court of Justice, they are substantially and structurally different from that article. Moreover, Article 21(3) on applicable law provides its own rule of interpretation:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender . . . , age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

<sup>14</sup> Even Article 103 of the UN Charter, in accordance with which the member states' obligations under the Charter prevail over any other international obligations, will not directly overcome this problem. Article 103 binds the states but not the court. The court, under Article 17 of its statute, is obliged to determine that a case is inadmissible when certain conditions are met. The states in whose favor a decision of admissibility is made may then renounce their rights under the statute and consent to the court's exercise of jurisdiction.

While the original intention behind this paragraph may have been to limit the court's powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the court on these matters. It provides a standard against which all the law applied by the court should be tested. This is sweeping language, which, as drafted, could apply to all three categories in Article 21. For instance, if the court decides that certain provisions of the Elements of Crimes or the Rules of Procedure and Evidence are not compatible with the standards set out in paragraph 3 of Article 21, it would not have to apply them. The provision also lays down special rules of interpretation for Article 21.

#### IV. CRIMES

One of the key issues throughout the negotiations, beginning during the deliberations of the Preparatory Committee, was which crimes should fall within the jurisdiction of the court. While there was virtually unanimous agreement on including genocide, other crimes had diverse supporters and opponents. An overwhelming majority of states supported the inclusion of war crimes, crimes against humanity and aggression. Some states, in particular the Caribbean governments, supported inclusion of drug trafficking. Inclusion of the crime of terrorism also enjoyed some support. In addition, some states supported inclusion of crimes against the United Nations and associated personnel. During the latter part of the negotiations in the Preparatory Committee, however, support for the inclusion of drug trafficking, terrorism and crimes against UN and associated personnel slackened, as it became clear that some states were unalterably opposed. The opposition was based on the fact that the nature of investigating the crimes of drug trafficking and terrorism, which requires long-term planning, infiltration into the organizations involved, the necessity of giving immunity to some individuals involved, and so forth, makes them better suited for national prosecution. Furthermore, their inclusion would have required revision of parts of the statute that had already been negotiated. In addition, it became clear that there was no time to secure a generally acceptable definition of terrorism and the Convention on the Safety of United Nations and Associated Personnel was not yet in force.<sup>15</sup> The inconclusive status of these crimes was indicated in the working document sent by the Preparatory Committee to the Rome Conference.<sup>16</sup>

The inclusion of the crime of aggression, which received overwhelming support in the Preparatory Committee, also faced definitional problems. The intractable issue proved to be the role of the Security Council in the determination of aggression. While many states preferred a fixed and independent definition of aggression insusceptible to review by the Security Council, other states, including the five permanent members, took the position that the court could exercise jurisdiction with respect to this crime only after the Council determined that an act of aggression had occurred. By the end of the negotiations in the Preparatory Committee, there was a sense that the definition of aggression had become too complicated and divisive and could become a casualty in the context of a larger compromise.

<sup>15</sup> GA Res. 49/59, UN GAOR, 49th Sess., Supp. No. 49, at 299, UN Doc. A/49/49 (1994), *reprinted in* 34 ILM 482 (1995). Under Article 27, 22 ratifications were necessary for the Convention to enter into force. The 22d instrument of ratification was deposited by New Zealand on December 16, 1998, and the Convention entered into force on January 15, 1999.

<sup>16</sup> UN Doc. A/CONF.183/2/Add.1 n.18 (1998).

The draft list of crimes that was forwarded to the Rome Conference by the Preparatory Committee listed "(a) the crime of genocide; (b) the crime of aggression; (c) war crimes; (c) crimes against humanity; and (e) [other crimes]." <sup>17</sup> The first four crimes were known as the "four core crimes."

At Rome, virtually all states supported inclusion in the statute of the crime of genocide, war crimes, and crimes against humanity. The conference did not have time to consider definitions of other crimes that would be acceptable to all, or to the majority of, states. As it was, even the definition of the core crimes took considerable time and ran into complications. The conference leadership appreciated that, to attract an overwhelming majority in support of the statute, some accommodation among the supporters of each of the other crimes was required. With regard to crimes against UN and associated personnel, Spain proposed language in the definition of war crimes that would have included crimes against UN personnel, obviating a separate category of crimes. This proposal was widely supported and language to that effect was eventually incorporated in Article 8(1), (b)(iii) and (e)(iii) of the statute. The crimes of terrorism and drug trafficking were included in a resolution adopted by the conference, which recommended that the Review Conference consider them with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the court's jurisdiction. <sup>18</sup>

The crime of aggression was treated differently. At about the middle of the Rome Conference, it became clear that support for the inclusion of aggression was increasing despite the knowledge that no agreement could be reached at the conference either on its definition or on the role of the Security Council. The permanent members indicated that they could agree on the inclusion of the crime of aggression only if the proper role of the Security Council in accordance with the Charter were recognized. Many other states distinguished between the definition of aggression for the ICC and the competence of the Security Council to determine whether an act was aggression. Some of these states also contended that, while the Security Council had primary competence to determine whether an act constituted aggression, its competence on the subject was not exclusive. The support of the Non-Aligned Movement for inclusion of the crimes of aggression and the use of nuclear weapons was particularly strong. Many European states, including some NATO members, also insisted on the inclusion of aggression. Ultimately, a compromise was reached: Article 5(2) of the statute incorporates the crime of aggression, but the court may exercise jurisdiction in that regard only after the crime has been defined and the conditions for such exercise have been agreed upon. Furthermore, any provision on these issues must be consistent with the Charter of the United Nations. The latter text is intended to take account of the concerns of the permanent members of the Security Council that the statute not be used to amend the Charter by infringing on the competence of the Council to determine acts of aggression. In sum, Article 5 of the statute now lists the crime of genocide, crimes against humanity, war crimes and the crime of aggression as within the jurisdiction of the court.

Genocide, defined in Article 6, was the only crime that received a quick and unanimous consensus. Its definition follows verbatim Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, <sup>19</sup> except for the replacement of the word "Convention" with the word "Statute" in the opening clause.

Contrary to the general expectation, crimes against humanity (Article 7) proved difficult to negotiate. In the earliest phase of negotiation in the Preparatory Committee,

<sup>17</sup> *Id.*, Art. 5, at 11.

<sup>18</sup> See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Res. E, UN Doc. A/CONF.183/10\*, at 7 (1998) [hereinafter Final Act].

<sup>19</sup> Dec. 9, 1948, 78 UNTS 277.

it became clear that a short article on crimes against humanity modeled after Article 5 of the Statute of the Yugoslav Tribunal<sup>20</sup> would be unacceptable to the majority of states. States also disagreed over whether the crime should be limited to acts occurring in time of armed conflict and what the threshold of gravity of the crime should be. At Rome, it was agreed that crimes against humanity are not limited to times of armed conflict but must be committed "as part of a widespread *or* systematic attack directed against any civilian population, with knowledge of the attack." At the earlier phases of negotiation, some states had insisted that the threshold should be raised so as to exclude crimes such as serial killings or a single murder. These states preferred that "widespread or systematic attack" be replaced with "widespread and systematic attack." Others were concerned that such a change would unnecessarily raise the threshold. Ultimately, it was agreed that the threshold would remain "widespread or systematic attack directed against any civilian population," but that the words "attack directed against any civilian population" would be defined in subparagraph 2(a) of the same article, which requires "multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack." Accordingly, crimes against humanity may be committed not only by or under the direction of state officials, but also by "organizations." The latter word is intended to include such groups as terrorist organizations and organizations of insurrectional or separatist movements. Therefore, the opening clause of Article 7 setting forth the general threshold for crimes against humanity should be read together with its subparagraph 2(a). This approach provided a basis for compromise on several other acts listed in Article 7 as crimes against humanity. Some attempts were made to include terrorism and economic embargo in the list of crimes against humanity. The proposals, however, did not generate sufficient support for acceptance.

Article 7 of the statute contains a much broader definition of crimes against humanity than those in the Statutes of the contemporary ad hoc international criminal Tribunals.<sup>21</sup> It specifically includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity. The inclusion of "forced pregnancy" was passionately debated. A number of states were concerned that its inclusion could be misinterpreted to interfere with national laws concerning either the right to life of the unborn child or a woman's right to termination of pregnancy. Many Muslim states opposed it on the ground that forced pregnancy was not a new crime and was the consequence of the crime of rape, which was already included in the text. A compromise was reached to include "forced pregnancy" rather than the term "enforced pregnancy" and to define it in paragraph 2 of the article, with the hope that it could not be used in support of legalizing abortion.

Deportation or forcible transfer of population, enforced disappearance of persons and apartheid are also included in paragraph 1 and defined in paragraph 2. Deportation is defined in paragraph 2(d) as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law." The United States and Israel objected to the inclusion of "other coercive acts." The definition of "torture" in paragraph 2(e) excludes "lawful sanctions" to allay the concerns of some Muslim states that certain Islamic forms of punishment not be considered as "torture" within the meaning of the statute.

<sup>20</sup> UN Doc. S/25704, annex, *reprinted in* 32 ILM 1192 (1993). For additional discussion, see the report by Darryl Robinson on the negotiation of the article on crimes against humanity, *infra* p. 43.

<sup>21</sup> The Statute of the Yugoslav Tribunal in its Article 5 and the Statute of the Rwanda Tribunal in its Article 3 list the following acts as crimes against humanity: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; and other inhumane acts. For the Rwanda Statute, see SC Res. 955, annex (Nov. 8, 1994), *reprinted in* 33 ILM 1602 (1994).

The act of "persecution" in paragraph 1 is defined to include acts against "any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . , or other grounds that are universally recognized as impermissible under international law," but only in connection with other crimes and not as a separate crime. It was difficult to win consensus on persecution on grounds of "gender." Some states preferred to leave the word "gender" undefined and some delegations insisted that the word simply meant men and women as biologically defined. The issue came up in regard to other parts of the statute as well. A compromise was struck to provide a definition for "gender," applicable to the entire statute, in paragraph 3 of Article 7, where the word appears for the first time. Paragraph 3 provides: "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

War crimes are included in Article 8. From the start of the negotiations on the statute, war crimes proved to be one of the most intractable issues. Special difficulties arose in regard to the inclusion of certain topics: Protocol II Additional to the Geneva Conventions,<sup>22</sup> internal armed conflicts, nuclear weapons in the list of prohibited weapons, and child soldiers.

Some states took the position that only those war crimes that are recognized as such by customary international law should be included. This position therefore supported these crimes enumerated in the 1949 Geneva Conventions, the 1907 Hague Convention and the 1929 Geneva Convention.<sup>23</sup> Others pressed for extending the reach of the statute to crimes in the Protocols Additional to the Geneva Conventions. Some opposed inclusion of any crimes occurring in internal armed conflict, while others insisted that they be covered. As a result of these conflicting positions, the text of the article on war crimes was drafted in four sections: grave breaches of the 1949 Geneva Conventions, war crimes under Protocol I Additional to the Geneva Conventions,<sup>24</sup> violations of common Article 3 of the four Geneva Conventions, and breaches under Protocol II.<sup>25</sup> This structure, which had been created to facilitate negotiation, survived as the final structure of the article in the Rome statute. But the text that emerged does not always maintain the four distinct categories. It also drew from other treaties. Indeed, many of the provisions in the last category of war crimes are drawn from Protocol I, the Geneva Conventions and the Hague Conventions.<sup>26</sup> Although some of these norms were originally intended to

<sup>22</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 UNTS 609 [hereinafter Protocol II].

<sup>23</sup> See, respectively, [Geneva] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; [Hague] Convention [No. IV] Respecting the Laws and Customs of War on Land, with annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; and [Geneva] Convention Relative to the Treatment of Prisoners of War, July 18, 1929, 118 UNTS 303.

<sup>24</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 [hereinafter Protocol I].

<sup>25</sup> The four Geneva Conventions deal with the law of armed conflict of an international character and the protection of civilians. The Geneva Conventions are mostly concerned with the protection of persons in the power of a party to the hostilities. Article 3 of the four Geneva Conventions establishes standards for noninternational armed conflicts. Protocol I supplements the four Geneva Conventions for international armed conflicts. Protocol II deals with noninternational armed conflicts.

<sup>26</sup> For the 1907 Hague Convention No. IV, see *supra* note 23. [Hague] Convention [No. II] with Respect to the Laws and Customs of War on Land, with annexed Regulations, July 29, 1899, 32 Stat. 1803, 1 Bevans 247; [Geneva] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 23; [Geneva] Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; [Geneva] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; [Geneva] Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287. For Protocol I, see *supra* note 24; and for Protocol II, see *supra* note 22.

apply to international armed conflicts, the drafters of the statute thought that they should also apply to internal armed conflicts.

Some states argued that the decision that the court was to have jurisdiction over serious crimes of concern to the international community necessarily implied that not every war crime would be included. "[O]nly" those crimes committed "as part of a plan or policy or as part of a large-scale commission of such crimes" would fall within its jurisdiction.<sup>27</sup> Some other states did not agree and felt that the word "only" would raise the threshold unnecessarily. The compromise language forged at Rome reads in Article 8(1) that "[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." The inclusion of the words "in particular" was intended to indicate the type of war crimes over which the court has jurisdiction. The language as drafted, however, does not exclude jurisdiction over a single war crime listed in the subsequent paragraphs of the article.

Paragraph 2 of Article 8 sets out four categories of war crimes: "(a) [g]rave breaches of the Geneva Conventions of 12 August 1949"; "(b) [o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law"; "(c) [i]n the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions"; and "(e) [o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law." Many of the provisions of subparagraphs 2(b) and (e) are parallel or identical.

The opening clauses of subparagraphs 2(b) and (e) are qualified by the words "within the established framework of international law." These words were intended to include implicitly considerations of the *jus in bello* such as military necessity and proportionality. Some delegations, however, expressed the view that these words also included requirements such as those in Article 85(3) and (4) of Protocol I, dealing with causing death or serious injury to body or health or when committed willfully and in violation of the Geneva Conventions or the Protocols.

The text of paragraph 2(b)(iii) and (e)(iii) of Article 8 deals with "[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict." This provision was included in place of a separate crime against United Nations and associated personnel. The latter part of the paragraph provides that the personnel, installations, material and other elements of humanitarian assistance and UN peacekeeping are protected so long as they remain civilian or civilian objects. It excludes situations in which UN personnel become involved or take part in hostilities.

The provisions in paragraph 2(b)(ix) and (e)(iv) cover "[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives." The text is based on Article 27 of Hague Convention No. IV of 1907, as well as the Convention for the Protection of Cultural Property of 1954<sup>28</sup> and Articles 85(4)(d) and 53 of Protocol I. The innovation in the text is the addition of "buildings dedicated to . . . education," which was originally proposed by New Zealand and Switzerland. A compromise was reached for the inclusion

<sup>27</sup> See "Elsewhere in the Statute," UN Doc. A/CONF.183/2/Add.1, at 25 (1998).

<sup>28</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 UNTS 240.

of these buildings by changing the last words of the paragraph from "military purposes" to "military objectives," which has a narrower reference.

Subparagraphs (e)(vi) and (b)(xxii) of Article 8(2) are parallel and deal with gender-based crimes. The difference is that the comparison in subparagraph (b)(xxii) is with the grave breaches of the Geneva Conventions, while that in subparagraph (e)(vi) is with violations of Article 3 common to the Geneva Conventions. In view of gender-based crimes in Bosnia and Rwanda, NGOs played an important role in securing the inclusion of this provision.

Subparagraphs (b)(xxvi) and (e)(vii) are parallel, dealing with enlisting children under the age of fifteen to participate in hostilities. These provisions are very much the result of inputs from NGOs. The texts are based on Article 38 of the Convention on the Rights of the Child<sup>29</sup> and Articles 77(2) of Protocol I and 4(3)(c) of Protocol II. The text in subparagraph (b)(xxvi) speaks of "national armed forces." The inclusion of the word "national" was intended to exclude situations like the intifada. The words "armed forces or groups" in subparagraph (e)(vii) are designed to take account of a frequent situation in internal armed conflicts, in which armed groups as well as armed forces are involved. Both subparagraphs set the age limit of children at "under the age of fifteen years," avoid the use of the word "recruited," and qualify the violation by "using them [children] to participate actively in hostilities." The word "actively" was inserted to exclude situations in which children are involved in support functions during hostilities. Attempts were made by some states and NGOs to raise the age of the children to eighteen to make it compatible with the definition under the Convention on the Rights of the Child, Article 1 of which defines the child as every human being below the age of eighteen. These attempts, however, faced strong resistance by other states, which relied on the age of below fifteen in Article 77 of Protocol I, as well as Article 38 of the Convention on the Rights of the Child.

Two issues concerning prohibited weapons raised problems: nuclear weapons and the inclusion of general language that could prohibit the use of future weapons with particular characteristics. The inclusion of nuclear weapons, which was supported by the majority of the participating states, was strongly opposed by some major nuclear powers. To encourage at least some of the major nuclear powers to support adoption of the statute, the reference to nuclear weapons was finally deleted. The inclusion of prospectively prohibitive language, which would have provided a general description of weapons that could be prohibited at some stage in the future, was opposed by more states. In their view, such a catchall and open-ended clause was incompatible with the principle of legality requiring absolute clarity in a criminal code. They insisted that the prohibition of any weapon should be clearly stated in the statute before its use becomes criminalized. As a compromise, subparagraph (b)(xx) prescribes three criteria for the inclusion of new weapons whose use will be considered war crimes. First, new weapons must be "of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict." Second, such weapons must be the "subject of a comprehensive prohibition." Third, such weapons must be "included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123." The language of subparagraph (b)(xx) leaves open the possibility of including nuclear weapons. However, nuclear weapons or any new weapons can be included only through an amendment or review procedure of the statute, which cannot begin until the expiry of seven years after its entry

<sup>29</sup> GA Res. 44/25, UN GAOR, 44th Sess., Supp. No. 49, at 166, UN Doc. A/44/49 (1989), reprinted in 28 ILM 1443 (1989), 29 *id.* at 1340 (1990).



into force (Articles 121(1) and 123(1)). Moreover, even were a new weapon to be included among the list of prohibited weapons by amending the statute, its prohibition would be binding only on those states that had ratified the amendment.

Both subparagraphs 2(c) and (e) dealing with internal armed conflict had to be qualified to forge consensus. Subparagraph 2(d) qualifies subparagraph (c) by providing that it does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." Subparagraph 2(f), qualifying subparagraph (e), further provides that it applies "to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." This language is based on Article 1(1) of Protocol II with the aim of further clarifying the scope of the subparagraph.

Paragraph 3 of Article 8 is based on Article 3 of Protocol II, dealing with nonintervention in the internal affairs of states. It was introduced to assuage the concerns of some states. Paragraph 3 provides that nothing in the subparagraphs dealing with internal armed conflicts "shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."

In the latter part of the negotiations in the Preparatory Committee, the United States proposed the inclusion of elements of crimes. The proposal was first raised in connection with the definition of war crimes. Later, however, it was expanded to deal with genocide and crimes against humanity. The United States took the position that the crimes in the statute are not sufficiently defined and that the principle of legality dictated a further and full definition of their elements. The majority of states opposed the inclusion of the elements of crimes on two grounds: it would delay the adoption of the statute, its coming into force and the establishment of the court; and it was superfluous, since all the necessary elements were already included in either the definition of crimes or Part 3, General Principles of Criminal Law. Many delegations were concerned that it would be extremely difficult to reach an agreement on detailed elaborations of the elements of crimes, taking into account, among other factors, the differences in the criminal laws of civil and common law countries, as well as the different approaches to criminal law of individual states. A further concern was that any detailed elaboration of the elements of crimes might narrow their definition in the statute and thus introduce a substantive change into the statute.

As a compromise, it was agreed to include elements of crimes in Article 9, on the condition that their preparation and adoption should be separate from those of the statute, and should not affect its adoption, its entry into force or the operation of the court. Article 9, Elements of Crimes, provides that these elements shall assist the court in the interpretation and application of Articles 6, 7 and 8—which define the three crimes. "Elements of Crimes" and any subsequent amendments to it must be approved by a two-thirds majority of the members of the Assembly of States Parties. Furthermore, the Elements of Crimes and its amendments must be consistent with the statute. The resolution of the conference that established the Preparatory Commission for the International Criminal Court provides that the Preparatory Commission shall finalize the draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes before June 30, 2000.<sup>30</sup> The date is set in anticipation of the entry into force of the statute and the first meeting of states parties to deal with the remaining issues concerning the establishment of the court.

<sup>30</sup> See Final Act, *supra* note 18, Res. F, para. 6, at 9.

During the preparatory phase, in 1997, a number of states were concerned about what they considered a "conservative" approach to the definition of war crimes and feared that such an approach might prevail and, as a result, hamper the development of international law in this area. This concern led to a suggestion that language be included somewhere in the statute to the effect that nothing in it "shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law."<sup>31</sup> During the Rome Conference, however, the tenor of negotiations over war crimes changed substantially. The war crimes definition is anything but conservative and the definition of crimes against humanity is much broader than what was anticipated during the earlier phases of the negotiations.<sup>32</sup> The interest in the safeguard language now shifted from protecting the future development of international law to shielding the statute from such developments. Article 10 deals with jurisdiction *ratione temporis* and reads: "Nothing in this Part [part 2 of the statute] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."<sup>33</sup>

The crimes under the statute, because of their seriousness, are not subject to any statute of limitations (Article 29).

### V. GENERAL PRINCIPLES OF CRIMINAL LAW

Part 3, General Principles of Criminal Law, composed of twelve articles, sets out the statute's substantive criminal law, including the basis for individual criminal responsibility and grounds for excluding criminal responsibility. This part states clearly that the court has jurisdiction over "natural persons" (Article 25(1)). But the court lacks jurisdiction over any person under the age of eighteen at the time the crime was committed (Article 26). During the preparatory phase, France proposed extending the court's jurisdiction to organizations. That proposal was addressed at Rome but could not gather sufficient support and was dropped. Articles 22 and 23 deal with the principles of *nullum crimen sine lege* and *nulla poena sine lege*.

An individual is responsible for an act or omission. The word "conduct" is used throughout the statute as including acts and omissions. An individual is criminally responsible for the commission of the crime, whether as an individual or jointly; ordering, soliciting or inducing the commission of a crime that in fact occurs or is attempted; or facilitating the commission of a crime, or aiding, abetting or otherwise assisting in its commission or attempted commission (Article 25). An individual may also be criminally responsible for, in any other way, intentionally contributing to the commission or the attempted commission of a crime by a group of persons acting with a common purpose, when that contribution is made with the "aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court," or is "made in the knowledge of the intention of the group to commit the crime."<sup>34</sup> This language is intended to include other forms of participation, including conspiracy, a concept that does not exist as such in civil law systems. It was taken verbatim from Article 2(3)(c) of

<sup>31</sup> See UN Doc. A/CONF.183/2/Add.1, at 25, Art. Y (1998).

<sup>32</sup> Crimes against humanity are not limited to those occurring during armed conflicts but also include those committed in time of peace and encompass other crimes covered by the Statutes of the two ad hoc Tribunals. Despite the original intention of including only war crimes under customary international law, some of the crimes found in Article 8 had not theretofore been recognized as customary. See the discussion on crimes against humanity and war crimes above.

<sup>33</sup> Article 10 was negotiated at the last minute and is the only article in the statute without a title.

<sup>34</sup> See ICC statute, *supra* note 9, Art. 25, para. 2(d).

the International Convention for the Suppression of Terrorist Bombings,<sup>35</sup> which in turn was taken from a treaty on extradition of the European Union.<sup>36</sup> In cases of genocide, an individual would also have criminal responsibility for direct and public incitement.<sup>37</sup> The attempt to commit a crime is also a criminal act so long as the individual has taken substantial steps toward commission of the crime, even if the crime does not occur because of circumstances independent of the individual's intention.<sup>38</sup>

The official position of the individual or any immunity or special procedural rules that may attach to the individual because of his or her official capacity will not bar the jurisdiction of the court (Article 27). During the preparatory phase of the negotiations, two basic issues were raised in relation to command responsibility: first, whether command responsibility was a form of criminal responsibility in addition to other forms of responsibility or whether it expressed a different principle, to the effect that commanders are not immune from responsibility for the acts of their subordinates; and second, whether command responsibility should extend to any superior in a nonmilitary setting. The Rome Conference answered both questions in the affirmative. Article 28 deals with the responsibility of commanders and other superiors with respect to the criminal acts of subordinates under their effective authority and control. The words "effective authority and control" are intended to superimpose in a civilian setting the requirements of the same types of relationships between superior and subordinate in the military.

Articles 31 and 32 address grounds for excluding criminal responsibility. Superior orders and prescription of law are not grounds for excluding criminal responsibility unless the person was under a legal obligation to obey such orders, the person did not know that the order was unlawful, *and* the order was not manifestly unlawful (Article 33). The first part of this three-part exception is included because a superior order, under the statute, applies to civilians, as well as to the military. Orders to commit genocide or crimes against humanity are manifestly unlawful.<sup>39</sup>

## VI. ORGANIZATION OF THE COURT

Part 4, Composition and Administration of the Court, comprises nineteen articles. The court will be composed of four organs: the Presidency; an Appeals, a Pre-Trial and a Trial Division; the Office of the Prosecutor; and the Registry (Article 34). The court is to have eighteen judges, nominated and elected by states parties (Article 36). They will be elected as full-time personnel and shall be available to serve on that basis (Article 35). But the statute anticipates that some of the judges, other than the president and vice-presidents, may be part-time depending on the court's workload.

As regards the qualification of judges, there were extensive discussions on the relative proportion between judges with criminal law experience and those with international and humanitarian law experience. At the end, a compromise was reached, dividing the bench between at least nine judges with a criminal law background and at least five with an international and humanitarian law background (Article 36). Throughout the preparatory phase of negotiations, there was support for placing an age limit on the nominees. The age requirement was dropped at the Rome Conference. Some states preferred to have a system of screening the nominations of judges by which a short list

<sup>35</sup> GA Res. 52/164, UN GAOR, 52d Sess., Supp. No. 49, at 389, UN Doc. A/52/49 (1998). It was adopted on Jan. 9, 1998.

<sup>36</sup> Convention drawn up on the basis of Article K.3 of the Treaty on European Union relating to Extradition between the Member States of the European Union, Sept. 27, 1996, 1996 O.J. (C 313) 3.

<sup>37</sup> ICC statute, *supra* note 9, Art. 33, para. 2.

<sup>38</sup> *Id.*, Art. 25, para. 3(f).

<sup>39</sup> *Id.*, Art. 33, para. 2.

could be prepared. Other states did not find the idea appealing. At the end, there was a compromise, by which the Assembly of States Parties may decide to establish an Advisory Committee on nominations.<sup>40</sup> While the judges must be the nationals of states parties, there is no such restriction on the prosecutor, who will also be elected by states parties, and the registrar, who will be elected by the judges.<sup>41</sup> The official languages of the court will be the official languages of the United Nations, but the working languages will be English and French.<sup>42</sup>

At the first election, one-third of the judges (six judges) will serve by lot for a term of three years, one-third for a term of six years, and the remainder for a term of nine years. Except for the judges who will serve for a three-year term, the other judges may not stand for reelection (Article 36).

The Rules of Procedure and Evidence will enter into force when adopted by a two-thirds majority of states parties (Article 51). In case of conflict between the Rules of Procedure and Evidence and the statute, the statute will prevail. The court's regulations will be adopted by an absolute majority of the judges (Article 52).

## VII. INVESTIGATION, PROSECUTION AND TRIAL

Part 5, Investigation and Prosecution, consists of nine articles. It addresses the steps to be taken to initiate investigations, the rights of the person under investigation, and other requirements to be complied with before trial. During the preparatory phase, the question of how to address amnesties and truth commissions was never seriously discussed, in part because of pressure from the human rights groups. The same evasive approach was taken at Rome. The statute does not preclude the court's competence over criminal conduct of individuals covered by amnesties or truth commissions. But it allows the prosecutor not to proceed with an investigation if it would not serve the interests of justice (Article 53). Such a decision by the prosecutor may be reversed by the pretrial chamber.<sup>43</sup> This chamber may issue an arrest warrant on the prosecutor's application if it is satisfied that there are reasonable grounds to believe that the person committed a crime within the court's jurisdiction (Article 58). The custodial state is expected to comply with the order (Article 59). The pretrial chamber must hold hearings to confirm charges in the presence of the person charged. However, in exceptional circumstances, the chamber may hold a hearing in the absence of the person charged (Article 61). At the request of the prosecutor, the pretrial chamber may also take measures necessary to avail itself of a unique opportunity to collect evidence that may not be available subsequently for the purposes of a trial (Article 56). These measures must take into account the efficiency and integrity of the proceedings and the rights of the defense.

Part 6, The Trial, contains fifteen articles. It addresses the conduct of the trial, rights of the accused, protection of victims and witnesses, and admissibility of evidence. Trial must be in the presence of the accused (Article 63). Due process for the accused and his or her rights are fully recognized. The presumption of innocence is established in Article 66. The accused is entitled, *inter alia*, to having a public and fair hearing conducted impartially and without delay; being promptly informed of the charges in a language he or she fully understands and speaks; having adequate time and facilities to prepare a defense and to examine witnesses against him or her before and during the trial; having

<sup>40</sup> *Id.*, Art. 36, para. 4(c).

<sup>41</sup> *Id.*, Art. 43, para. 4.

<sup>42</sup> *Id.*, Art. 50.

<sup>43</sup> The pretrial chamber may review the decision by the prosecutor not to proceed with prosecution either at the request of the state concerned or the Security Council, if they had referred the matter to the court, or on its own initiative. *Id.*, Art. 53, para. 3.

the free assistance of a competent interpreter and necessary translations; and not being compelled to testify or confess guilt.<sup>44</sup> The question of protection of national security information was of particular concern to major powers. The text that emerged leaves the final decision on whether the disclosure of information would prejudice its national security to the state itself (Article 72). The state, however, is obliged to cooperate with the court to see how the matter can be resolved. Use of *in camera* or *ex parte* proceedings, summaries or redactions of disclosure of the information, as well as other permissible protective measures, is allowed. But the state still has wide latitude in deciding on the disclosure of evidence in any form.

Reparation to victims was raised during the preparatory phase of the negotiations. There was some opposition to the idea on the ground that the statute establishes a criminal court that will not be equipped to address reparations. There were also concerns about the sources from which reparation may be made and enforcement of an order of reparations by the court. At Rome, the subject attracted more interest, particularly from France, the United Kingdom and many NGOs. The result was the inclusion of Article 75, which requires the court to establish principles relating to reparations to victims, including restitution, compensation and rehabilitation. The court may make an order directly against a convicted person for reparations. States parties to the statute are required to enforce the court's order.<sup>45</sup> To the same effect, the statute provides for a trust fund to be established for the benefit of the victims and their families (Article 79). Forfeiture of proceeds, property and assets derived directly or indirectly from the crime may be imposed as a penalty, subject to the rights of bona fide third parties. The statute does not define bona fide third parties or specify under what system of law it should be defined. Presumably, conflict-of-laws methods would have to determine that question. The fines or forfeiture ordered by the court may be transferred to the trust fund for the benefit of victims and their families (Article 79). When reparations to victims were taken up, some states raised the question of reparations for individuals who are unlawfully arrested or detained. Article 85 was included to address this concern. It provides that anyone "who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Similarly, when a person has been wrongly convicted of a crime and subsequent evidence shows a clear miscarriage of justice, that person is entitled to compensation.

Part 7, Penalties, is composed of four articles. The question of the death penalty was difficult to negotiate because its supporters could not agree to its exclusion from the statute, lest it undermine their own national laws permitting capital punishment. With the leadership of Norway, a compromise formula was reached (Article 77): the death penalty was excluded from the statute, but the President of the Rome Conference read a statement in the plenary to the effect that there was no international consensus on the inclusion or exclusion of the death penalty. That statement indicated that, by virtue of the principle of complementarity, national jurisdictions have the primary responsibility for investigating, prosecuting and punishing individuals in accordance with their own laws.<sup>46</sup> Under this compromise, one may note, a person convicted of a crime under the

<sup>44</sup> *Id.*, Arts. 63–67.

<sup>45</sup> *Id.*, Art. 75, para. 2.

<sup>46</sup> The following statement with regard to the noninclusion of the death penalty in the statute was read by the President of the Rome Conference on July 17, 1998, at the last meeting of the plenary:

The debate at this Conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principle of complementarity between the Court and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing

statute may receive the death penalty in a national court, but not under the statute if that person was convicted for the same crime by the ICC. This understanding is confirmed by Article 80 on nonprejudice to the national application of penalties and national laws.

Part 8, Appeal and Revision, consisting of five articles, allows for the decision of the trial chamber to be appealed by either the prosecutor or the convicted person. Other decisions that may be appealed include those regarding jurisdiction and admissibility, the grant or denial of release of the person investigated or accused, the fair and expeditious conduct of proceedings, and functions and powers of the pretrial chamber.<sup>47</sup> Some of the proceedings will be heard on an expedited basis (Article 82). The appeals chamber may reverse or amend the decision or a sentence or may order a new trial before a different trial chamber (Article 83).

### VIII. JUDICIAL ASSISTANCE

Part 9, International Cooperation and Judicial Assistance, contains seventeen articles. States parties to the statute are obliged to cooperate with the court and they shall ensure that their domestic laws provide for the forms of cooperation specified under the statute (Articles 86 and 88). The articles of this part, however, recognize that compliance with the court's requests should be in accordance with domestic procedural law. When a state party receives a request from both the court and another state to surrender an indicted person for the same crime, it shall give priority to the court's request if the court has already determined that the case is admissible. Otherwise, the state is free to decide which request to execute. In cases where the competing requests are for the same person but not for the same crime, the state party shall give priority to the court's request (Article 90). States parties are obliged to cooperate with the court in respect of other matters, such as the service of documents, facilitating the appearance of witnesses or experts, the examination of sites, execution of searches and seizures, the protection of victims and witnesses, and the preservation of evidence (Article 93). A state party may postpone execution of a request from the court, if it decides that it will interfere with an ongoing investigation or prosecution or the admissibility of the case is being challenged before the court (Articles 94 and 95). While the rule of speciality is recognized in the statute, a state party may waive it, either on its own initiative or at the court's request (Article 101). The court is to report noncooperation by states parties to the Assembly of States Parties or the Security Council, if the matter was referred to the court by the Council.

Article 98 deals with a conflict between the obligations of a state toward the ICC and toward another state under international law. In this context, two issues were of particular concern to the negotiators of the Rome statute: first, the ICC's request for surrender of a person or property that enjoys diplomatic immunity in the territory of the requested state; and second, the ICC's request for surrender of a non-national and the obligation of the requested state toward the state of nationality of that person, which requires the consent of that state. Paragraph 1 of Article 98 addresses the first issue by barring the ICC from requesting a surrender or assistance that would require the requested state to act

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individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislation and practices with regard to the death penalty. Nor shall it be considered as influencing the development of customary international law or in any other way the legality of penalties imposed by national systems for serious crimes.

<sup>47</sup> ICC statute, *supra* note 9, Art. 81.

inconsistently with its obligations under international law with respect to immunity of a person or property of a third state, unless the court can first obtain the consent of the third state for the waiver of the immunity. Paragraph 2 addresses the second question. The main concern in this paragraph is to respect the obligations of host states under status-of-forces agreements. Under these agreements, the forces of a sending state may remain under its jurisdiction for some or all matters, and not under that of the host state. In accordance with paragraph 2, where there are such international agreements, unless the court first obtains the consent of the sending state, it may not request a surrender of its nationals from the host state.

#### IX. OTHER MATTERS

Part 10, Enforcement, includes nine articles. A sentence of imprisonment shall be served in a state chosen by the court from a list of states that have indicated their willingness to accept sentenced persons (Article 103). The court shall supervise the enforcement of conditions of imprisonment, which is governed by the law of the state of enforcement and must be consistent with widely accepted international treaty standards governing the treatment of prisoners (Article 106).

Part 11 consists of a single article establishing the Assembly of States Parties.<sup>48</sup> The function of the Assembly of States Parties is to provide oversight for the court and its operation. Non-states parties that have signed the statute or the Final Act may be observers in the assembly. The assembly is to approve the budget of the court, decide on the number of judges, and deal with noncooperation, or perform any other function consistent with the statute and the Rules of Procedure and Evidence. The Assembly of States Parties will meet once a year at the seat of the court or at the headquarters of the United Nations. Decisions on matters of substance shall be taken by a two-thirds majority of those present and voting, provided that an absolute majority of states parties constitutes the quorum for voting. On procedural matters, decisions of the assembly may be taken by a simple majority of states parties present and voting.

Financing of the court is addressed in the six articles of part 12. Expenses shall be paid from assessed contributions made by states parties and funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to expenses incurred in cases of referral by the Security Council (Articles 114 and 115). The court may also receive funds from governments and nongovernmental entities and individuals.

The ten articles of part 13 constitute the final clauses. The court has competence to decide on any dispute regarding its "judicial functions" (Article 119). This broad competence encompasses not only the court's jurisdiction, but also other matters, including requests for judicial cooperation. Any other dispute between states parties relating to the interpretation or application of the statute that is not settled through negotiations within three months shall be referred to the Assembly of States Parties. It is for the assembly to decide how to settle the matter, including whether it should be referred to the International Court of Justice.<sup>49</sup>

The question of reservations was discussed intensely during the preparatory phase. Some states preferred the possibility of reservations to some articles or no provision on reservations, in which case the Vienna Convention on the Law of Treaties would apply.<sup>50</sup> The majority of states, however, felt that reservations could undermine the statute. Consequently, no reservations are allowed (Article 120), but a state party may opt out of the provision giving the ICC

<sup>48</sup> *Id.*, Art. 112.

<sup>49</sup> *Id.*, Art. 119.

<sup>50</sup> *Opened for signature* May 23, 1969, Art. 19, 1155 UNTS 331.

jurisdiction over war crimes for a period of seven years (Article 124). However, there may be situations in which a conflict of jurisdiction may arise as between two states parties in relation to war crimes. For example, the territorial state has consented to the court's jurisdiction unconditionally, while the state of nationality of the accused has opted out of the court's jurisdiction over war crimes for seven years. The statute is silent on the interpretation of Article 12 on the jurisdiction of the court in the event of such a conflict.

Seven years after the entry into force of the statute, any state party may propose amendments to it. Amendments, if not adopted by consensus, require a two-thirds majority of states parties (Article 121). One year after the deposit of instruments of ratification by seven-eighths of the state parties, the amendments will become binding on all states.<sup>51</sup> States that do not accept an amendment have one year to withdraw from the statute with immediate effect.<sup>52</sup> However, any amendments to the articles dealing with the list of crimes and their definitions will be binding only on those states that have ratified them.<sup>53</sup> Amendments to a limited number of articles of an institutional nature will enter into force for all states parties six months after their adoption by a two-thirds majority of states parties (Article 122). The first Review Conference of the statute will take place seven years after its entry into force and, thereafter, at the request of any state party with the approval of the majority of states parties (Article 123).

In addition to the articles on amendments to the statute, Articles 9 and 51 require a two-thirds majority of states parties for the adoption of the Elements of Crimes and Rules of Procedure and Evidence. The Rules of Procedure and Evidence will enter into force once adopted as such. The Elements of Crimes, however, requires ratification by seven-eighths of states parties.<sup>54</sup>

The statute will be open for signature until December 31, 2000.<sup>55</sup> It requires sixty ratifications to come into force (Article 126). States may withdraw from the statute. Withdrawal will take effect one year after the date of notification of withdrawal (Article 127).

## X. THE NEXT STEP

In accordance with a resolution adopted at the Rome Conference, a Preparatory Commission will be established to prepare, among others, texts for the Elements of Crimes, the Rules of Procedure and Evidence, the Financial Regulations and Rules, and the first budget of the court. Under the resolution, the Preparatory Commission must complete its work on the Elements of Crimes and the Rules of Procedure and Evidence by July 30, 2000. The Preparatory Commission consists of states that have signed the Final Act of the conference and other states that were invited to participate in the conference.

<sup>51</sup> ICC statute, *supra* note 9, Art. 121, para. 4.

<sup>52</sup> *Id.*, Art. 121, para. 6.

<sup>53</sup> *Id.*, Art. 121, para. 5.

<sup>54</sup> *Id.*, Art. 121, para. 4.

<sup>55</sup> *Id.*, Art. 125, para. 1. As of January 22, 1999, the following 71 states had signed the statute: Albania, Angola, Antigua and Barbuda, Austria, Australia, Belgium, Bolivia, Burkina Faso, Cameroon, Canada, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Denmark, Djibouti, Ecuador, Eritrea, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Honduras, Iceland, Ireland, Italy, Jordan, Kyrgyzstan, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Mali, Malta, Mauritius, Monaco, Namibia, the Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Portugal, Samoa, San Marino, Senegal, Sierra Leone, Slovakia, Slovenia, the Solomon Islands, South Africa, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, the United Kingdom, Venezuela, Zambia, and Zimbabwe. The updated information on the status of signature and ratification of the statute is available at <[www.un.org/DEPTS/Treaty](http://www.un.org/DEPTS/Treaty)>.



In short, all states may participate in the Preparatory Commission. The commission will report to the first Assembly of States Parties.<sup>56</sup>

MAHNOUSH H. ARSANJANI\*

## DEFINING "CRIMES AGAINST HUMANITY" AT THE ROME CONFERENCE

### I. INTRODUCTION

On July 17, 1998, the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) adopted the Rome Statute of the International Criminal Court (ICC).<sup>1</sup> One of the many significant provisions of the ICC statute is Article 7, which defines "crimes against humanity" for the purpose of the ICC. A significant difference between the definition in the ICC statute and the major precedents on crimes against humanity is that the former definition was not imposed by victors (as were those in the Nuremberg and Tokyo Charters<sup>2</sup>) or by the Security Council (as were those in the Statutes of the Yugoslavia and Rwanda Tribunals<sup>3</sup>). In contrast, Article 7 was developed through multilateral negotiations involving 160 states.<sup>4</sup> For this reason, one could reasonably expect Article 7 to be more detailed than previous definitions, given the interest of participating states in knowing the precise contours of the corresponding obligations they would be undertaking. For the same reason, one might expect the definition to be more restrictive than previous definitions.<sup>5</sup> Fortunately, although the definition in the ICC statute is more detailed than previous definitions, it generally seems to reflect most of the positive developments identified in recent authorities. For example, the definition does not require any nexus to armed conflict, does not require proof of a discriminatory motive, and recognizes the crime of apartheid and enforced disappearance as inhumane acts.

<sup>56</sup> Res. F, *supra* note 30, para. 8.

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<sup>1</sup> General information on the conference, as well as the ICC statute, is available at <www.un.org/icc>. The statute is reprinted in 37 ILM 999 (1998).

<sup>2</sup> Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, UNTS 279, *as amended*, Protocol to Agreement and Charter, Oct. 6, 1945 [hereinafter Nuremberg Charter]; and Charter of the International Military Tribunal for the Far East, Jan. 19, 1946 (General Orders No. 1), *as amended*, General Orders No. 20, Apr. 26, 1946, TIAS No. 1589, 4 Bevans 20 [hereinafter Tokyo Charter]. These documents and other relevant documents are reproduced in M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (1992).

<sup>3</sup> The Statute of the International Criminal Tribunal for the former Yugoslavia was adopted by the Security Council acting pursuant to Chapter VII of the UN Charter. SC Res. 827 (May 25, 1993). For the Statute, see UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993) [hereinafter ICTY Statute]. The Statute of the International Criminal Tribunal for Rwanda was also adopted by the Security Council acting pursuant to Chapter VII of the UN Charter. SC Res. 955, annex (Nov. 8, 1994), *reprinted in* 33 ILM 1602 (1994) [hereinafter ICTR Statute].

<sup>4</sup> Delegations readily agreed that "crimes against humanity" give rise to individual criminal responsibility in customary international law, but found that there was no single authoritative definition of the crime, and that there were inconsistencies among the major precedents on the definition. Given the number of states involved in the negotiations, and the fact that discussions were based on national positions as to the content of current customary international law, one may hope that the definition in the ICC statute will eventually be regarded as more authoritative than previous formulations.

<sup>5</sup> A different dynamic results not only because of the number of states involved, but also because of the inclination to demand more rigor where the definition is not simply being imposed on others but is potentially more broadly applicable.

The negotiations on crimes against humanity at the Rome Conference were coordinated by Dr. Waleed Sadi of Jordan, and many delegations made a substantial contribution to the final product. Paragraph 1 of Article 7 mirrors the structure appearing in the ICTY and ICTR Statutes, featuring a list of inhumane acts, such as murder, torture and rape, and a chapeau that specifies the conditions under which the commission of those acts rises to the level of "crimes against humanity," thereby warranting international scrutiny. Paragraphs 2 and 3 of Article 7 offer further clarification of the terms appearing in paragraph 1.

This paper will examine the definition of "crimes against humanity" developed at the Rome Conference. Before examining the provisions of Article 7, an overview of the historical development of "crimes against humanity" will be instructive.

## II. OVERVIEW OF HISTORICAL DEVELOPMENT

The evolution of the concept of crimes against humanity in customary international law has not been orderly. A definition was first articulated in the Nuremberg Charter in 1945; but whether this was a legislative act creating a new crime or whether it simply articulated a crime already embedded in the fabric of customary international law remains controversial.<sup>6</sup> The latter view is arguably supported by general principles of law recognized by the community of nations, as evidenced by, for example, the "Martens clause" of the 1899 and 1907 Hague Conventions,<sup>7</sup> referring to the "laws of humanity"; the Joint Declaration of May 28, 1915, condemning "crimes against humanity and civilization";<sup>8</sup> and the 1919 report of the Commission on the Responsibility of the Authors of War, advocating individual criminal responsibility for violations of the "laws of humanity."<sup>9</sup> With this background, the drafters of the Nuremberg Charter found themselves confronted with an appalling "policy of atrocities and persecutions against civilian populations," which in many cases did not fit the technical definition of war crimes (for example, inhumane acts against civilians who were not enemy nationals) and yet were unquestionably contrary to the dictates of the public conscience and general principles of law recognized by the community of nations.<sup>10</sup> The drafters therefore formulated a definition intended to encapsulate these norms. Article 6(c) of the Nuremberg Charter defined "crimes against humanity" as

<sup>6</sup> Much has been written on this question; schools of thought are canvassed in Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICKINSON J. INT'L L. 58 (1995); and Joseph Rikhof, *Crimes against Humanity, Customary International Law and the International Tribunals for Bosnia and Rwanda*, 6 NAT'L J. CONST. L. 231 (1995). See also Bassiouni's major text on the subject, *supra* note 2.

<sup>7</sup> The Preamble to the Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247, and the Preamble to the Convention Respecting the Laws and Customs of War on Land, with annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, specify that in cases not included in the Hague Regulations, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

<sup>8</sup> The Joint Declaration of France, Great Britain and Russia denounced the massacre of Armenians in Turkey as crimes against humanity and civilization, and warned of prosecution. See UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 35 (1948); and Egon Schwelb, *Crimes against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 181 (1946).

<sup>9</sup> Following the First World War, the 1919 Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War, excerpted in BASSIOUNI, *supra* note 2, at 553-65, recommended the creation of a high tribunal to try persons belonging to enemy countries who were guilty of "offences against the laws and customs of war or the laws of humanity." However, the U.S. representatives objected to the creation of an international criminal tribunal and to the references to the laws of humanity on the grounds that these had not been sufficiently ascertained. See ANNEX II to the Report.

<sup>10</sup> See BASSIOUNI, *supra* note 2, at 69-86; UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 8, at 174-77.

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated.<sup>11</sup>

The formulation in the Nuremberg Charter was incorporated, with some changes, in the Tokyo Charter and in the Allied Control Council Law No. 10.<sup>12</sup> In the decades that followed, efforts to elaborate a generally acceptable definition of crimes against humanity did not make headway,<sup>13</sup> although particular crimes against humanity, such as genocide, apartheid and enforced disappearance, were identified in subsequent international instruments.<sup>14</sup>

The next major development was the adoption by the Security Council of the ICTY and ICTR Statutes in 1993 and 1994, respectively.<sup>15</sup> The definition of "crime against humanity" in each Statute contains a list of inhumane acts, prefaced by a chapeau that describes the circumstances under which the commission of those acts amounts to a crime against humanity. There are differences between the two definitions; for example, the ICTY Statute suggests that a nexus to armed conflict is required, whereas the ICTR Statute suggests that a discriminatory motive is required (these differences are discussed in more detail below). The creation of the Tribunals also paved the way for the development of a body of international jurisprudence on crimes against humanity, which helped guide the delegations assembled at the Rome Conference.

### III. ARTICLE 7 OF THE STATUTE

#### *The Chapeau*

The chapeau of Article 7, paragraph 1 of the ICC statute confirms that, "[f]or the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." The important features of this chapeau, which will be discussed below, are (1) the absence of a requirement of a nexus to armed conflict, (2) the absence of a requirement of a discriminatory motive, (3) the "widespread or systematic attack" criterion, and (4) the element of *mens rea*.

*Nexus to armed conflict.* A minority of delegations participating in the Rome Conference strongly felt that crimes against humanity could be committed only in the context of an armed conflict. However, the majority of delegations believed that such a limitation

<sup>11</sup> Nuremberg Charter, *supra* note 2, Art. 6(c).

<sup>12</sup> Tokyo Charter, *supra* note 2; Allied Control Council Law No. 10, CONTROL COUNCIL FOR GERMANY, OFFICIAL GAZETTE, Jan. 31, 1946, at 50. The differences among these instruments will be discussed in the analysis below.

<sup>13</sup> After producing the Report on the Principles of the Nürnberg Tribunal in 1950, the International Law Commission prepared the draft Code of Offences against the Peace and Security of Mankind in 1954, and followed up with submission of a draft Code of Crimes against the Peace and Security of Mankind in 1991 and another revision in 1996; but these have not been developed into international instruments. See Report of the International Law Commission on the work of its forty-third session, UN GAOR, 46th Sess., Supp. No. 10, at 94, UN Doc. A/46/10 (1991) [hereinafter 1991 draft code]; and Report of the International Law Commission on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No. 10, at 14, UN Doc. A/51/10 (1996) [hereinafter 1996 ILC Report].

<sup>14</sup> Convention on the Prevention and Suppression of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277; Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 UNTS 243; Declaration on the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, UN GAOR, 47th Sess., Supp. No. 49, at 207, UN Doc. A/47/49 (1992); Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, OEA Doc. AG/RES. 1256 (XXIV-0/94), reprinted in 33 ILM 1529 (1994).

<sup>15</sup> See *supra* note 3.

would have rendered crimes against humanity largely redundant, as they would have been subsumed in most cases within the definition of "war crimes." In the view of the majority, such a restriction would have been inconsistent with post-Nuremberg developments, as observed in statements of the International Law Commission (ILC), the ICTY and other commentators<sup>16</sup> and reflected in instruments addressing specific crimes against humanity, such as the Genocide Convention and the Apartheid Convention.

One of the most important features of the definition in the ICC statute is that it makes no reference to a nexus to armed conflict, affirming that crimes against humanity can occur not only during armed conflict but also during times of peace or civil strife. This outcome was essential to the practical effectiveness of the ICC in responding to large-scale atrocities committed by governments against their own populations.

*Discriminatory motive.* Another difficult issue in the negotiations was whether the definition should require a discriminatory motive, i.e., that the crime be committed on national, political, ethnic, racial or religious grounds. All participants agreed that the specific crime of *persecution* required a discriminatory motive (as discrimination is the essence of the crime of persecution), but the majority maintained that not all crimes against humanity required a discriminatory motive. While the Nuremberg Charter could be construed as requiring a discriminatory motive for all crimes against humanity, that interpretation has been generally rejected and the dominant view is that the discriminatory motive is relevant only to the crime of persecution.<sup>17</sup> Nevertheless, such a requirement did appear in the ICTR Statute, and, although the ICTY Statute contains no such requirement, it was also applied by the ICTY in the *Tadić* opinion and judgment because of statements by members of the Security Council and a reference in the report in which the Secretary-General submitted the ICTY Statute.<sup>18</sup> In adopting this approach, however, ICTY Trial Chamber II expressly observed that the requirement does not appear to be supported by the relevant international instruments, such as the Nuremberg and Tokyo Charters, the Allied Control Council Law No. 10, the Genocide Convention, the Apartheid Convention and the ILC draft Code of Crimes.<sup>19</sup>

The negotiations in Rome produced agreement that a discriminatory motive is not an element required for all crimes against humanity. This approach avoids the imposition of an onerous and unnecessary burden on the prosecution. Moreover, the requirement

<sup>16</sup> The ILC commented with respect to its 1996 draft Code of Crimes that "[t]he definition of crimes against humanity in the present article does not include the requirement that an act was committed in times of war. . . . The autonomy of crimes against humanity was recognized in [the instruments subsequent to the Nuremberg Charter] which did not include this requirement." 1996 ILC Report, *supra* note 13, at 96. Although constrained by the language of the ICTY Statute (which explicitly requires a nexus to armed conflict), the ICTY appeals chamber correctly observed that the requirement of a nexus to armed conflict was peculiar to the Nuremberg Charter and does not appear in subsequent instruments. *Prosecutor v. Tadić*, Appeal on Jurisdiction, No. IT-54-1-AR72, paras. 140-41 (Oct. 2, 1995), reprinted in 35 ILM 32 (1996). (ICTY cases cited in this article are available at <[www.un.org/icty](http://www.un.org/icty)>). See also, e.g., Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 553, 557 (1995); and Rikhof, *supra* note 6, at 242-44. The Nuremberg Charter stated that crimes against humanity could occur "before or during the war," but a nexus was indirectly introduced by the requirement that the crime be connected to war crimes or a crime against peace. This "connection" requirement appeared in the Tokyo Charter but not in the Allied Control Council Law No. 10 or in subsequent instruments. A further discussion of the connection to other crimes appears below in the context of the crime of persecution.

<sup>17</sup> When the 1954 ILC draft Code of Crimes suggested that discriminatory motive was required for all crimes against humanity, it was strongly criticized for misconstruing the Nuremberg Charter in D. H. N. Johnson, *Draft Code of Offenses against the Peace and Security of Mankind*, 4 INT'L & COMP. L.Q. 445 (1955). Johnson's article was widely received as expressing the correct interpretation, and the subsequent ILC draft codes have reflected Johnson's approach.

<sup>18</sup> See *Prosecutor v. Tadić*, Opinion and Judgment, No. IT-94-1-T, para. 652 (May 7, 1997), excerpted in 36 ILM 908, 944 (1997).

<sup>19</sup> *Id.*, paras. 650-52, 36 ILM at 943-44.

of a discriminatory motive, particularly when coupled with a closed list of prohibited grounds, could have resulted in the inadvertent exclusion of some very serious crimes against humanity.

*Widespread or systematic attack.* It was agreed by all participants at the Rome Conference that not every inhumane act amounts to a "crime against humanity," and that a stringent threshold test is required. Delegations readily adopted two terms familiar from Tribunal jurisprudence and other sources, namely, the qualifiers "widespread" and "systematic." The term "widespread" requires large-scale action involving a substantial number of victims, whereas the term "systematic" requires a high degree of orchestration and methodical planning.<sup>20</sup>

The most controversial and difficult issue in the negotiations on the definition of "crimes against humanity" was whether these qualifiers should be *disjunctive* (i.e., widespread or systematic) or *conjunctive* (i.e., widespread and systematic). During the negotiations, a contingent composed predominantly of members of the "like-minded group" argued that a disjunctive test had already been established in existing authorities. For example, the ICTR Statute requires that the inhumane acts be committed "as part of a widespread *or* systematic attack against any civilian population."<sup>21</sup>

On the other hand, another sizable contingent, including some permanent members of the Security Council and many delegations from the Arab Group and the Asian Group, pointed out that, as a practical matter, a disjunctive test would be overinclusive. For example, a legitimate question was raised whether the "widespread" commission of crimes should be sufficient, since a spontaneous wave of widespread, but completely unrelated crimes does not constitute a "crime against humanity" under existing authorities.

Fortunately, a solution was found to overcome this seemingly irreconcilable divide, as it was successfully argued that the legitimate concerns about a disjunctive test were already addressed within the concept of an "attack directed against any civilian population," as will be explained in the following paragraphs. The contingent favoring the conjunctive test was willing to accept this argument but wanted the understanding spelled out in the statute. Thus was born subparagraph 2(a) of Article 7, which defines an "attack directed against any civilian population"<sup>22</sup> as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." Subparagraph 2(a) draws upon various authorities to meet the legitimate con-

<sup>20</sup> These terms are discussed in a recent ICTR decision, *Prosecutor v. Akayesu*, Judgment, No. ICTR-96-4-T (Sept. 2, 1998), available at <www.un.org/icttr>, which held:

The concept of "widespread" may be defined as massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of "systematic" may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.

See *id.* §6.4. See also 1996 ILC Report, *supra* note 13, at 94-96; and *Tadić* Opinion and Judgment, *supra* note 18, para. 648, 36 ILM at 942-43.

<sup>21</sup> ICTR Statute, *supra* note 3, Art. 3 (emphasis added). Likewise, ICTY Trial Chamber II has confirmed that, "[i]n addition to the *Report of the Secretary-General* numerous other sources support the conclusion that widespreadness and systematicity are alternatives." *Tadić* Opinion and Judgment, *supra* note 18, para. 647, 36 ILM at 942. Oddly, however, the French version of the ICTR Statute uses the conjunctive widespread and systematic test (*généralisée et systématique*) owing to a translation error. ICTR Statute, *supra*, Art. 3.

<sup>22</sup> Some delegations would have preferred not to use the term "attack" or to refer to "civilian" populations. Rather, they favored the formulation "widespread or systematic commission of such acts." However, reliance on the term "attack directed against any civilian population" was an essential aspect of the compromise and is adequately supported by existing authorities.

cerns raised, by affirming that an "attack directed against any civilian population" involves some degree of scale, as well as a policy element, as is discussed in the following sections.

The plain meaning of the term "attack directed against any civilian population" implies some element of scale. This understanding is confirmed by the early authorities, such as the 1948 report of the UN War Crimes Commission.<sup>23</sup> More recently, the ICTY held that the term "'directed against any civilian population' ensures that what is to be alleged will not be one particular act but, instead, a *course of conduct*."<sup>24</sup> Likewise, in the *Tadić* opinion and judgment, the ICTY held that the term "population" "is intended to imply crimes of a collective nature and thus exclude single or isolated acts."<sup>25</sup> This is now reflected in the requirement in subparagraph 2(a) of "a course of conduct involving the multiple commission of acts referred to in paragraph 1."<sup>26</sup>

Two points must be emphasized here. The first is that this test does not reintroduce the "widespread" criterion as a mandatory requirement in all cases. "Widespread" is a high-threshold test, requiring a substantial number of victims and "massive, frequent, large-scale action,"<sup>27</sup> whereas the term "course of conduct" and the reference to multiple acts were regarded as presenting a lower threshold.<sup>28</sup> The second point is that it need not be proven that the accused personally committed multiple offenses; an accused is criminally liable for a single inhumane act (e.g., murder), provided that the act was committed as part of the broader attack.<sup>29</sup>

The plain meaning of the phrase "attack *directed* against any civilian population" also implies an element of planning or direction (the "policy element"). The compromise reached in Rome was made possible by the explicit recognition of this element. Many observers would have preferred not to recognize the policy element explicitly, for fear of making prosecution more difficult, but the applicability of the policy element is supported by the bulk of authority since Nuremberg. The drafting history of the Nuremberg Charter and the pronouncements of the Nuremberg Tribunal underscore the focus on the "policy of atrocities and persecutions against civilian populations," also described as a "policy of terror" and a "policy of persecu-

<sup>23</sup> The UN War Crimes Commission noted that the term "population" "appears to indicate that a larger body of victims is visualized and that single or isolated acts against individuals may be considered to fall outside the scope of the concept." UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 8, at 193.

<sup>24</sup> Prosecutor v. *Tadić*, Form of the Indictment, No. IT-94-1-T, para. 11 (Nov. 14, 1995) (emphasis added).

<sup>25</sup> *Tadić* Opinion and Judgment, *supra* note 18, para. 644, 36 ILM at 941.

<sup>26</sup> The "acts referred to in paragraph 1" are the enumerated unlawful acts, such as murder, enslavement and torture. The somewhat awkward phrase "multiple commission of acts" was adopted instead of "commission of multiple acts" because several delegations were concerned that the latter formulation might be erroneously construed as requiring more than one *kind* of unlawful act.

<sup>27</sup> Prosecutor v. Akayesu, *supra* note 20; see also 1996 ILC Report, *supra* note 13, at 96.

<sup>28</sup> The terms "course of conduct" and "multiple commission" were regarded by delegations as presenting a considerably lower threshold than the "massive, frequent, large-scale" action connoted by "widespread." The latter terms, loosely derived from Tribunal jurisprudence, were chosen to rule out isolated or single acts. On the somewhat awkward phrase "multiple commission of acts," see *supra* note 26.

<sup>29</sup> Article 7, paragraph 1 of the Rome statute affirms that a crime against humanity means "any of the following acts when committed as part of a widespread or systematic attack." This is consistent with existing authorities. See, e.g., the *Tadić* Opinion and Judgment: "Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable." *Tadić* Opinion and Judgment, *supra* note 18, para. 649, 36 ILM at 943. However, it does not necessarily follow that the ICC will choose to be seized of cases where the accused committed only a single murder (albeit as part of a widespread or systematic attack); in some cases the court may decline jurisdiction where the gravity of the case does not justify that it take further action. See ICC statute, *supra* note 1, Art. 17(1)(d).

tion, repression and murder of civilians."<sup>30</sup> In addition, the jurisprudence of subsequent military tribunals reveals that a policy element was a requisite for crimes against humanity.<sup>31</sup>

This policy element has subsequently been reflected in the work of the ILC, the decisions of the ICTY and the writings of jurists. The ILC draft Code of Crimes requires that all crimes against humanity must be "instigated or directed by a Government or by any organization or group."<sup>32</sup> The ILC noted that it is this direction or instigation that "gives the act its great dimension and makes it a crime against humanity."<sup>33</sup> The ICTY, when interpreting the phrase "directed against any civilian population," confirmed that "there must be some form of a governmental, organizational or group policy to commit these acts."<sup>34</sup> Virginia Morris and Michael Scharf, in the *Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, observe that the phrase "directed against any civilian population" requires a "systematic plan or general policy."<sup>35</sup> M. Cherif Bassiouni, in his leading text on the subject, *Crimes against Humanity in International Criminal Law*, notes that the policy element is "the essential characteristic of 'crimes against humanity,'" giving these otherwise domestic crimes the requisite "international element."<sup>36</sup>

The policy element of crimes against humanity is also affirmed by decisions of national courts. For example, the French Cour de Cassation in the *Barbie* and *Touvier* cases required that the criminal acts be affiliated with or accomplished in the name of "a state practicing a policy of ideological hegemony."<sup>37</sup> The Netherlands Hoge Raad in the *Menten* case held that "the concept of 'crimes against humanity' also requires . . . that the crimes in question form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of peoples."<sup>38</sup> Likewise, the Supreme Court of Canada in the *Finta* case held that "[w]hat distinguishes a crime against humanity from any other criminal offence under the Canadian *Criminal Code* is that the cruel and

<sup>30</sup> See, e.g., the excerpts of the Nuremberg Judgment quoted by the UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 8, at 194–95; and BASSIOUNI, *supra* note 2, at 756–66.

<sup>31</sup> See, e.g., the decision of the U.S. Military Tribunal in Nuremberg in the *Altstötter* case, regarding "proof of systematic governmental organisation of the acts as a necessary element of crimes against humanity." 6 LAW REPORTS OF TRIALS OF MAJOR WAR CRIMINALS 1, 79–80 (UN War Crimes Commission, 1948). See also the *Flick* decision in 9 *id.* at 1, 51.

<sup>32</sup> 1996 ILC Report, *supra* note 13, at 93, 95–96.

<sup>33</sup> *Id.* at 96.

<sup>34</sup> *Tadić* Opinion and Judgment, *supra* note 18, para. 644, 36 ILM at 941.

<sup>35</sup> VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 79–80 (1995). Similarly, much earlier authorities such as JOSEPH B. KEENAN & BRENDAN F. BROWN, CRIMES AGAINST INTERNATIONAL LAW 117 (1950), noted that crimes against humanity are

inhumanities which result from policy decisions made on the highest plane of civil or military authority. They are the effects of a definitely criminal State policy. They are not the isolated and casual atrocities and inhumanities which are perpetrated by soldiers, in the heat of battle, on their own responsibility. . . . [C]rimes against humanity would be impossible without the active direction, or acquiescence, of leaders . . . in a position to coordinate that power over a wide area of operation . . .

Citations omitted.

<sup>36</sup> BASSIOUNI, *supra* note 2, at 244, 247.

<sup>37</sup> *Barbie*, Cass. crim., Dec. 20, 1985, 1985 Bull. Crim., No. 407, at 1053; *Touvier*, Cass. crim., Nov. 27, 1992, 1992 Bull. Crim., No. 394, at 1035. The stringent policy element adopted in these cases is criticized in Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994). Wexler persuasively questions both the requirement of state action and the requirement that the state be one "practicing a hegemonic political ideology." *Id.* at 360.

<sup>38</sup> *Public Prosecutor v. Menten*, 75 ILR 362, 362–63 (1981).

terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race."<sup>39</sup>

Thus, there is ample authority recognizing the policy element of crimes against humanity. Some commentators have persuasively argued against the policy element that has appeared in previous authorities, and in particular the supposed requirement of an "official policy of discrimination."<sup>40</sup> Fortunately, the ICC definition overcomes many of these objections, as it is more inclusive than some of the authorities just noted. First, Article 7 does not require a discriminatory policy and, second, Article 7 does not require an official (i.e., state) policy. The first point was addressed above in the discussion on "discriminatory motive," but the second warrants specific comment here.

As the ICTY has correctly noted, in the past "[t]he traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State."<sup>41</sup> Today, however, the dominant view among commentators is that customary international law has evolved in such a way that reference only to a state policy would be too restrictive. Nevertheless, some degree of organization is still required. For example, the ICTY has affirmed that crimes against humanity "need not be related to a policy established at a State level, in the conventional sense of the term," but "they cannot be the work of isolated individuals alone."<sup>42</sup> The *Tadić* opinion and judgment acknowledges that the entity behind the policy could be an organization with de facto control over territory, and leaves open the possibility that other organizations might meet the test as well.<sup>43</sup> To reflect these developments, the delegations at the Rome Conference made reference to a state or organizational policy.<sup>44</sup>

It must be emphasized that recognition of the policy element does not reintroduce the "systematic" criterion as a mandatory requirement in all cases. The term "systematic" requires a very high degree of organization or orchestration, and has been interpreted by the ICTR as meaning "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources."<sup>45</sup> In contrast,

<sup>39</sup> *Regina v. Finta*, [1994] 1 S.C.R. 701, 814.

<sup>40</sup> Mark R. von Sternberg, *A Comparison of the Yugoslav and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity"*, 22 BROOKLYN J. INT'L L. 111 (1996), argues that the suggestion of the UN Commissions of Inquiry (for former Yugoslavia and for Rwanda) that an "official policy of discrimination" is required would add a difficult evidentiary hurdle. He suggests replacing this test with a new element, "the degree to which the misconduct . . . has become repugnant in the public conscience." While philosophically useful, this test is too vague for use in a criminal law instrument. See also *supra* note 37, describing Wexler's criticism of French decisions.

<sup>41</sup> *Tadić* Opinion and Judgment, *supra* note 18, para. 654, 36 ILM at 944.

<sup>42</sup> *Prosecutor v. Nikolić*, Review of the Indictment Pursuant to Rule 61, No. IT-94-2-R61, para. 26 (Oct. 20, 1995).

<sup>43</sup> *Tadić* Opinion and Judgment, *supra* note 18, paras. 654-55, 36 ILM at 944-45. Rikhof, *supra* note 6, at 255-62, helpfully canvases the authorities, including national tribunals and international military tribunals, supporting the conclusion that a state policy is not needed and that a policy of a nonstate organization will suffice. See also 1991 draft code, *supra* note 13; and Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1963, Art. 2, 754 UNTS 73, reprinted in BASSIOUNI, *supra* note 2.

<sup>44</sup> Although the 1954 ILC draft code required the involvement or acquiescence of public officials, the ILC subsequently expanded this to include instigation by a "State, organization or group" in the 1991 draft Code of Crimes. The solution reached in Rome was to refer only to a state or organization, as it was agreed that using the term "organization" would sufficiently capture the present state of customary international law. The term "organization" is fairly flexible, and to the extent that there may be a gap between the concepts of "group" and "organization," it was considered that the planning of an attack against a civilian population requires a higher degree of organization, which is consistent with the latter concept.

<sup>45</sup> *Prosecutor v. Akayesu*, *supra* note 20, §6.4; see also *Tadić* Opinion and Judgment, *supra* note 18, para. 648, 36 ILM at 942-43; and 1996 ILC Report, *supra* note 13, at 94.



the term "policy" is much more flexible;<sup>46</sup> for example, in the *Tadić* opinion and judgment, the ICTY noted that a policy need not be formalized.<sup>47</sup> Thus, it is likely that, for example, proof of radio broadcasts advocating mass murder would be adequate proof of a "policy." In addition, the *Tadić* opinion and judgment suggests that the existence of a policy can in some circumstances reasonably be deduced from the manner in which the acts take place.<sup>48</sup>

The phrase "any civilian population" in the chapeau of Article 7, paragraph 1, and subparagraph 2(a) deserves specific comment. First, the term "any" confirms the well-established principle that the civilians need not be nationals of a foreign power; all civilians are protected.<sup>49</sup> The term "civilian" excludes attacks against armed forces,<sup>50</sup> although there is jurisprudence moderating this point.<sup>51</sup> The term "population" reflects the collective nature of the object of the attack, as was discussed above.

The test resulting from paragraph 1 and subparagraph 2(a) of Article 7 reflects a middle ground between a conjunctive test (widespread and systematic), which was clearly too restrictive, and an unqualified disjunctive test (widespread or systematic), which was considered too expansive. The text adopts the previously recognized threshold test of a "widespread or systematic" attack, but defines "attack," on the basis of relevant authorities, to alleviate concerns about an unqualified disjunctive test.

As a result, the prosecution must establish an "attack directed against any civilian population," which involves multiple acts and a policy element (a conjunctive but low threshold test), and show that this attack was either widespread or systematic (higher threshold but disjunctive alternatives). If the prosecutor chooses to prove the "widespread" element, the concern about completely unrelated acts is addressed, because of the policy element. If the prosecutor chooses to prove the "systematic" element, some element of scale must still be shown before ICC jurisdiction is warranted, because a course of conduct involving multiple crimes is required.

*Mens rea.* The definition in the ICC statute confirms that the accused, while not necessarily responsible for the overarching attack against the civilian population, must at least be aware of the attack.<sup>52</sup> Some observers had suggested that such knowledge should not be required. On this view, the existence of the attack against a civilian population would simply be a jurisdictional hurdle; once this hurdle is overcome, an accused could be convicted of a crime against humanity even if unaware of the overall attack. However, in the view of this author, the approach taken at the Rome Conference is more consistent

<sup>46</sup> The phrase "policy to commit such attack" in subparagraph 2(a) was deliberately chosen instead of "policy to commit such acts," in order to overcome the concern that the latter formulation would be too restrictive. The Women's Caucus for Gender Justice (an NGO) raised the concern that, in the case of rape, it might have been argued on the latter formulation that it was necessary to prove a policy to commit rape specifically. See Women's Caucus for Gender Justice, Priority Concerns about Crimes Against Humanity: Informal on Part II (July 1, 1998) (on file with author). Delegations therefore agreed to adopt the phrase "policy to commit such attack" in order to make clear that what is required is proof of a policy to commit an "attack," as generally defined in subparagraph 2(a).

<sup>47</sup> *Tadić* Opinion and Judgment, *supra* note 18, para. 653, 36 ILM at 944.

<sup>48</sup> *Id.* It remains to be seen whether the ICC will adopt this approach.

<sup>49</sup> See UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 8, at 193.

<sup>50</sup> Some states and nongovernmental organizations would have preferred to expand the definition to include "any population," but the term "civilian" was retained as part of the compromise, since the term is well established in the precedents. Moreover, widespread or systematic attacks against military personnel remain a legitimate and inescapable aspect of warfare.

<sup>51</sup> For example, the *Tadić* Opinion and Judgment refers to a "predominantly" civilian population, and gives an expansive interpretation to the term "civilian" in this context. The *Tadić* Opinion and Judgment also refers to the comments in the *Barbie* case that the members of an armed resistance could be victims of crimes against humanity in appropriate circumstances. See *Tadić* Opinion and Judgment, *supra* note 18, paras. 638–42, 36 ILM at 939–41.

<sup>52</sup> ICC statute, *supra* note 1, Art. 7, para. 1.

with fundamental principles of criminal law. The obligation of the prosecution to prove all elements of crimes, including the mental elements, has been described as the "golden thread" of criminal law.<sup>53</sup> The connection to a widespread or systematic attack is the essential and central element that raises an "ordinary" crime to one of the most serious crimes known to humanity. To convict a person of this most serious international crime, if the person was truly unaware of this essential and central element, would violate the principle *actus non facit reum nisi mens sit rea*. Moreover, the obligation to prove all mental elements does not impose an inappropriate burden on the prosecution. Given the inescapable notoriety of any widespread or systematic attack against a civilian population, it is difficult to imagine a situation where a person could commit a murder (for example) as part of such an attack while credibly claiming to have been completely unaware of that attack.<sup>54</sup> If such a case were to occur, however, the accused would have the *mens rea* for murder, but not for the far more serious charge of a "crime against humanity."<sup>55</sup>

### *The Enumerated Acts*

The chapeau of Article 7 sets out the conditions in which the enumerated acts are elevated from ordinary crimes to "crimes against humanity." The acts enumerated in subparagraphs 1(a) to (k) of Article 7 are murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance, apartheid and other inhumane acts.<sup>56</sup> For most of the enumerated acts, several delegations insisted on additional provisions that clarify these terms. The clarifications in paragraph 2 of Article 7 are drawn from various sources.

The term "murder" was considered to be sufficiently understood by reference to the applicable sources of law,<sup>57</sup> and therefore not to require additional clarification. To preclude an inappropriately restrictive interpretation of the term "imprisonment," subparagraph 1(e) includes reference to "other severe deprivation of physical liberty."<sup>58</sup> Paragraph 2 provides further clarification of the provisions on extermination,<sup>59</sup> enslave-

<sup>53</sup> *Woolmington v. Director of Public Prosecutions*, 1935 App. Cas. 462 (H.L.).

<sup>54</sup> As noted above, a single inhumane act (for example, a murder) by the accused can suffice to establish a crime against humanity, provided that the requirements of the chapeau are met. See *supra* note 29.

<sup>55</sup> A similar conclusion was reached by the Supreme Court of Canada in the *Finta* case, following a review of relevant jurisprudence:

These cases make it clear that in order to constitute a crime against humanity . . . there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity.

. . . [T]he mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crimes against humanity.

*Regina v. Finta*, [1994] 1 S.C.R. 701, 819. The same approach was adopted by the ICTY in the *Tadić* Opinion and Judgment, *supra* note 18, paras. 658–59, 36 ILM at 946.

<sup>56</sup> Murder, extermination, enslavement, deportation, persecution and other inhumane acts appeared in the Nuremberg and Tokyo Charters. Rape, imprisonment and torture were added in Control Council Law No. 10 to form a list that has been accepted as reflecting customary international law; that same list appears in the ICTY and ICTR Statutes. Enforced disappearance and the crime of apartheid were added to recognize particular types of inhumane act that have been identified by the international community as such, as is discussed below.

<sup>57</sup> Article 21 of the ICC statute specifies that the court shall apply (a) in the first place, the statute, the "Elements of Crimes" (to be adopted by the Assembly of States Parties) and the Rules of Procedure and Evidence; (b) in the second place, applicable treaties and principles and rules of international law; and (c), failing that, general principles of law derived from national laws of legal systems of the world.

<sup>58</sup> Either of these activities must be "in violation of fundamental rules of international law." ICC statute, *supra* note 1, Art. 7, subpara. 1(e). This qualifier was necessary because imprisonment *simpliciter* is carried out quite legitimately by all states (for example, the imprisonment of persons convicted after a fair trial).

<sup>59</sup> *Id.*, subparagraph 2(b) notes that "extermination" includes the "intentional infliction of conditions of life . . . calculated to bring about the destruction of part of a population." This language is borrowed from the

ment,<sup>60</sup> deportation<sup>61</sup> and torture.<sup>62</sup> The classical reference to "rape" was expanded and clarified in subparagraph 1(g), which refers to "[r]ape, sexual slavery, enforced prostitution, forced pregnancy,<sup>63</sup> enforced sterilization, or any other form of sexual violence of comparable gravity." This provision confirms that these acts, which have persisted in history, are inhumane acts encompassed within the definition of crimes against humanity.<sup>64</sup>

The definition of persecution, the recognition of enforced disappearance and apartheid, and the definition of "other inhumane acts" are of particular interest in the evolution of crimes against humanity and deserve more detailed comment.

*Persecution.* Persecution is the "intentional and severe deprivation of fundamental rights contrary to international law" against "any identifiable group or collectivity" on prohibited discriminatory grounds.<sup>65</sup> Although the crime of persecution is recognized in the major precedents (the Nuremberg and Tokyo Charters and the ICTY and ICTR Statutes), it was not defined, and many delegations were deeply concerned about the inclusion of this crime for fear that any discriminatory practices could be characterized as "crimes against humanity" by an activist court. All delegations agreed that the court's jurisdiction relates to serious violations of international criminal law, not international human rights law. To address the concerns raised about this crime, it was emphasized that, while discrimination may not be criminal, extreme forms amounting to deliberate persecution clearly are criminal. It was eventually agreed that the recognition of

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Genocide Convention. Subparagraph 2(b) notes as an illustration "the deprivation of access to food and medicine," but several other examples exist. This illustration was included at the request of Cuba. Cuba also attempted to have economic embargoes recognized as crimes against humanity, but this proposal received little support.

<sup>60</sup> *Id.*, subparagraph 2(c) specifies that "enslavement" means "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."

<sup>61</sup> *Id.*, subparagraph 1(d) encompasses "deportation or forcible transfer of population," which, under subparagraph 2(d), is defined as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."

<sup>62</sup> *Id.*, subparagraph 2(e) defines "torture" as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions." This definition is based on Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, Dec. 10, 1984, 1465 UNTS 85, except that the definition in the ICC statute is not limited to acts of public officials, since crimes against humanity can be committed at the behest of states or nonstate actors (see the discussion in text at notes 42–44 *supra* on the policy element).

<sup>63</sup> The inclusion of the crime of "forced pregnancy" has been the subject of considerable misunderstanding. This term does not create a universal right to abortion and does not in any way restrict the ability of states to regulate in this sensitive area on the basis of their own constitutional or philosophical principles. The term is included to recognize a particular harm inflicted on women, particularly during armed conflict, and to affirm the agreements reached in UN DEP'T OF PUB. INFO., PLATFORM FOR ACTION AND THE BEIJING DECLARATION: FOURTH WORLD CONFERENCE ON WOMEN, BEIJING, CHINA, UN Sales No. E.DPI/1766 (1996). ICC statute, *supra* note 1, subparagraph 2(f) specifies that "forced pregnancy" has three elements: (1) unlawful confinement, (2) of a woman forcibly made pregnant, and (3) with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. Subparagraph 2(f) further specifies that this provision "shall not in any way be interpreted as affecting national laws relating to pregnancy." Thus, the crime of "forced pregnancy" captures situations where women are forcibly impregnated and confined to force them to bear children of a conquering ethnic group, or for other purposes in grave violation of international law, such as medical experimentation.

<sup>64</sup> See 1996 ILC Report, *supra* note 13, at 102–03; Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424 (1993); AMNESTY INTERNATIONAL, THE INTERNATIONAL CRIMINAL COURT: ENSURING JUSTICE FOR WOMEN (AI Index No. IOR 40/06/98, 1998).

<sup>65</sup> ICC statute, *supra* note 1, Art. 7, subpara. 2(g). The ICTY noted in the *Tadić* Opinion and Judgment that, "although often used, the term has never been clearly defined in international criminal law," and concluded that it requires discrimination intentionally resulting in a denial of fundamental human rights. *Tadić* Opinion and Judgment, *supra* note 18, para. 694, 36 ILM at 955.

"persecution" as a crime was justified by the deliberate severity of the violations, the intentional discrimination on prohibited grounds, and the connection with other enumerated acts.

The Nuremberg Charter and the ICTY and ICTR Statutes include persecution on "political, racial or religious grounds."<sup>66</sup> As delegations wished to take into account the evolution of international norms, the ICC statute builds on these precedents by adding national, ethnic and gender grounds, which were drawn from the definition in the ICTR Statute.<sup>67</sup>

While many delegations would have preferred an open-ended list of grounds, this approach was strongly resisted on the basis that it would be too imprecise and would violate the principle of legality, since the statute would be an instrument of criminal law and not a declaratory human rights instrument. A compromise was eventually reached by including an open-ended, but very high-threshold provision, which refers to "other grounds that are universally recognized as impermissible under international law."<sup>68</sup> Thus, if any other prohibited grounds of discrimination become clearly established in international law, they can automatically be incorporated without amending the statute. Universal recognition, however, is a very high threshold; consequently, amendment of the statute to reflect future developments remains a possibility.

Another difficult issue at the Rome negotiations was whether the crime of persecution could be committed only in the context of other crimes; i.e., whether a connection to another crime was a prerequisite for "persecution." Under the Nuremberg Charter, persecution was only justiciable where a connection was established between the persecution and other crimes in that instrument.<sup>69</sup> This "connection" requirement appeared again in the Tokyo Charter but not in subsequent instruments, such as Control Council Law No. 10, or more recently, the ICTY and ICTR Statutes.<sup>70</sup> Nevertheless, many delegations strongly felt that such a connection was a necessary element of the crime of persecution, because of the vague and potentially elastic nature of this crime and the need to ensure an appropriate focus on its criminal nature. This position was not without merit; as Bassiouni has noted, "there is no crime known by the label 'persecution' in the world's major criminal justice systems, nor is there an international instrument that criminalizes it," and therefore "a reasonable nexus between the discriminatory policy and existing international crimes is needed."<sup>71</sup>

Other delegations were concerned that a requirement of a connection to other crimes would mean that persecution would be only an auxiliary offense, to be used as an additional charge or aggravating factor but never as a crime in itself.

<sup>66</sup> The Tokyo Charter omitted "religious" grounds, apparently because there was little evidence of persecution on religious grounds in that conflict.

<sup>67</sup> These three additional grounds appear in the chapeau of the ICTR Statute's definition, where they would apply to all crimes against humanity (unlike the ICC statute; see the discussion above of "discriminatory grounds"). "Gender" is defined in Article 7, paragraph 3 of the ICC statute as referring to "the two sexes, male and female, within the context of society."

<sup>68</sup> ICC statute, *supra* note 1, Art. 7, subpara. 1(h).

<sup>69</sup> In fact, the Berlin Protocol of October 6, 1945, amended the English and French texts of the Nuremberg Charter, making clear that such a connection would be required for all crimes against humanity, not just persecution. The Berlin Protocol is discussed in the authoritative article by Schwelb, *supra* note 8, at 187-88, 195-96. By removing a semicolon in the English text and rewording the French text, it was clarified that a connection to other crimes in the Nuremberg Charter (war crimes or crimes against peace) was a prerequisite for a crime against humanity.

<sup>70</sup> Indeed, the ICTY has held that "it is not necessary to have a separate act of an inhumane nature to constitute persecution." *Tadić* Opinion and Judgment, *supra* note 18, para. 697, 36 ILM at 956. In this respect, the compromise reached at the Rome Conference appears to be more restrictive than the law applied by the ICY.

<sup>71</sup> BASSIOUNI, *supra* note 2, at 318.

The compromise reached at the Rome Conference was to require a connection between persecution and any other crime within the jurisdiction of the ICC or any act referred to in paragraph 1 (i.e., other inhumane acts).<sup>72</sup> This latter phrase ensures that persecution will not be merely an auxiliary offense or aggravating factor. It is not necessary to demonstrate that the "connected" inhumane acts were committed on a widespread or systematic basis; it will suffice to show a connection between the persecution and any instance of murder, torture, rape or other inhumane act, which need not amount to a crime against humanity in its own right. While it could be argued that such a connection was no longer required in customary international law, its inclusion helped emphasize the criminal nature of persecution and bolstered support for inclusion of the crime. In practical terms, the requirement should not prove unduly restrictive, as a quick review of historical acts of persecution shows that persecution is inevitably accompanied by such inhumane acts.

*Enforced disappearance and apartheid.* The delegations participating in the Rome Conference agreed that the purpose of the deliberations on the definition of crimes was to identify existing customary international law and not to progressively develop the law. It was also agreed that this approach did not necessitate the reproduction of the list of inhumane acts that appeared in the Nuremberg Charter fifty years ago. Every formulation since Nuremberg has concluded its list of enumerated inhumane acts with the general phrase "other inhumane acts."<sup>73</sup> Many delegations pressed for specific acknowledgment of particular inhumane acts that have been of special concern to the international community. While such references could have been placed in the final subparagraph ("other inhumane acts," discussed below), delegates chose to include these references in separate subparagraphs.

Delegations were able to agree that the crime of apartheid was an inhumane act that resembled the other enumerated acts in character and gravity, and that warranted a specific reference, particularly as it had been identified as a crime against humanity in international instruments.<sup>74</sup> Likewise, delegations agreed that enforced disappearance, also previously identified as a crime against humanity in international instruments,<sup>75</sup> was

<sup>72</sup> ICC statute, *supra* note 1, Art. 7, subpara. 1(f).

<sup>73</sup> The interpretation of this provision must, of course, be subject to the principle of *ejusdem generis*, and therefore restricted to acts of a character and gravity similar to those of the other enumerated acts; see the discussion of "other inhumane acts" in text following note 76 below.

<sup>74</sup> The crime of apartheid is identified as a crime against humanity in Article 1 of the Convention on the Suppression and Punishment of the Crime of Apartheid, *supra* note 14; as well as in other instruments, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 43, Art. 1(b) (definition of crimes against humanity); and numerous General Assembly resolutions, e.g., GA Res. 48/89, UN GAOR, 48th Sess., Supp. No. 49, at 192, UN Doc. A/48/49 (1993). In ICC statute, *supra* note 1, Article 7, subparagraph 2(h), the crime of apartheid is defined as "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime." While the explicit reference to "inhumane acts of a character similar to those referred to in paragraph 1" underscores the fact that this crime would have already fallen within subparagraph 1(k) (other inhumane acts), specific acknowledgment of this crime was considered desirable in order to demonstrate the international community's disapprobation, and to provide a specific label for prosecution of such acts.

<sup>75</sup> Enforced disappearance is recognized as a crime against humanity in the UN Declaration on the Protection of All Persons from Enforced Disappearance, *supra* note 14, and in the Preamble to the Inter-American Convention on Forced Disappearance of Persons, *supra* note 14, which "reaffirm[s] that the systematic practice of the forced disappearance of persons constitutes a crime against humanity." The ILC, noting these pronouncements, put forward "forced disappearance of persons" as a crime against humanity in its 1996 draft Code of Crimes, 1996 ILC Report, *supra* note 13. Subparagraph 2(i) of Article 7 of the ICC statute, *supra* note 1, defines enforced disappearance as

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to

an inhumane act similar to the other acts in character and gravity, which warranted specific acknowledgment.<sup>76</sup>

*Other inhumane acts.* As the final heading, "other inhumane acts," appeared in the major precedents (including the Nuremberg Charter, the Tokyo Charter, Control Council Law No. 10, and the ICTY and ICTR Statutes), many delegations felt strongly that this provision must be preserved. Other delegations raised grave concerns about its imprecise and open-ended nature, which was considered inappropriate in a criminal law instrument. This argument was not without merit. Indeed, there is no crime by that label under other sources of international or national law,<sup>77</sup> which further deprives the term of precision and juridical pedigree.

The solution was to agree to include this final heading but to provide a clarifying threshold, specifying that the acts must be of a character similar to that of the other enumerated acts and must intentionally cause great suffering or serious injury to mental or physical health. Unlawful human experimentation and particularly violent assaults were two possibilities considered likely to fall within this heading.

#### IV. CONCLUSION

Article 7 of the ICC statute is a significant contribution to the refinement of international criminal law, as it is the first instance of a definition of crimes against humanity developed by multilateral negotiations among 160 states. The result of the natural tension between delegations favoring either a maximalist or a minimalist approach is a definition that is relatively balanced: although it contains more detail and precision than previous definitions, it also does not backtrack on essential points. Of particular importance is the absence of any requirement of a nexus to armed conflict or of a discriminatory motive. The text preserves the disjunctive "widespread or systematic" threshold test, together with an elaboration of the concept of an "attack against any civilian population," which is derived from relevant precedents. The explicit recognition of the policy element will be regretted by some observers, as it was not explicitly identified in previous instruments, but it is well supported by the jurisprudence of international and national tribunals and the relevant commentaries. The inclusion of enforced disappear-

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give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

This definition is loosely based on the Preamble to the UN Declaration on the Protection of All Persons from Enforced Disappearance, *supra*.

<sup>76</sup> The view that enforced disappearance clearly constitutes an "inhumane act" that would have fallen within previous definitions of crimes against humanity (all of which included "other inhumane acts") is bolstered by the fact that the Nuremberg Tribunal found that the Nazi practice of enforced disappearance constituted a crime against humanity:

On 7 December 1941 Hitler issued the directive since known as the "Nacht und Nebel Erlass" (Night and Fog decree), under which persons who committed offenses against the Reich . . . were to be taken secretly to Germany . . . . After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came, or their relatives; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the family of the arrested person. Hitler's purpose in issuing this decree was stated by the Defendant Keitel in a covering letter, dated 12 December 1941, to be as follows:

"Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal."

12 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 475-76 (1948) (which must be read in conjunction with p. 498).

<sup>77</sup> See BASSIOUNI, *supra* note 2, at 320. Bassiouni observes that the category "other inhumane acts" must be carefully circumscribed if it is not to violate the principle of legality.

ance and the crime of apartheid explicitly acknowledges two types of inhumane act that are of particular concern to the international community. Relatively vague terms such as "persecution" and "other inhumane acts" are preserved by clarifying and circumscribing their scope.

In summary, although the process of multilateral negotiation necessitated a more precise and regulative approach than in previous instruments, this constraint arguably served to strengthen the definition and the basis for individual criminal responsibility for these acts. Article 7 of the ICC statute sets forth a modernized and clarified definition of crimes against humanity that should provide a sound basis for international criminal prosecution in the future.

DARRYL ROBINSON\*

### PROGRESS AND JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

In May 1993, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY). Over the past five years, the ICTY has shifted from an institution lacking a basic structure, staff and other resources—not to mention indictees in custody—to a fully functioning tribunal pursuing (as of December 1998) twenty-two public indictments against fifty-six indictees; twenty-eight indictees are in custody, awaiting trial or serving a sentence; five have been convicted; one has pleaded guilty; one has been acquitted; several trials are under way; and several more are in pretrial stages. Although its ultimate success is not yet guaranteed, the ICTY is coming of age as a credible forum for the international prosecution of war crimes within its jurisdiction. The following account describes the ICTY's current status, analyzes its jurisprudence (as seen in its most significant decisions), and briefly assesses its place in the development of international humanitarian law.

#### I. THE SHIFT TO TRIAL WORK

The first three years of the ICTY's existence were largely spent addressing certain rudimentary matters, such as concluding arrangements with the Netherlands as host country; occupying a large, modern office building in The Hague; establishing field offices in the former Yugoslavia; recruiting experienced prosecutors, investigators, analysts, administrators and translators; electing eleven judges to serve on trial chambers and an appellate chamber; adopting rules governing procedure, evidence and detention; promoting implementing legislation by states so as to obtain their cooperation on matters such as detention of persons, deferral of national prosecutions to the ICTY, and postconviction imprisonment; securing increasing levels of funding through the regular UN budget; and obtaining contributions directly from states in the form of funds, personnel (on secondment) and contributions in kind (such as computer equipment). Once it had the necessary staff, the ICTY commenced investigations of persons reported

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to have committed war crimes in the former Yugoslavia and, from November 1994 to July 1996, issued eighteen public indictments covering seventy-five persons.<sup>1</sup>

For most of its first two years, however, the ICTY had no defendants in custody. Although arrested in Germany in February 1994, Duško Tadić was transferred to The Hague only in April 1995, after Germany passed enabling legislation. Owing to the lack of indictees in custody, the ICTY judges looked for other work to do. Consequently, they began holding hearings pursuant to ICTY Rule 61. In these public proceedings, a three-judge trial chamber (as opposed to the single judge who originally issued the indictment) examines an indictment and supporting evidence presented by the Office of the Prosecutor, including witness testimony. If the trial chamber determines that there are reasonable grounds for believing that the accused committed any of the crimes charged, it confirms the indictment on the basis of the evidence presented and issues an international arrest warrant (i.e., a warrant directed to all states, not just the state in which the accused is believed to reside, as is done when the original indictment is issued). The President of the ICTY may also then notify the Security Council if the trial chamber finds that the failure to serve the original arrest warrant on the indictee was due to a failure or refusal of a state to cooperate with the Tribunal. The indictee is not present at the proceeding; indeed, a lawyer claiming to represent the indictee is not permitted to appear before the trial chamber during such a proceeding, or to have access to the documents and files presented by the prosecutor to the chamber.<sup>2</sup> If the indictee is subsequently taken

<sup>1</sup> The principal constituent documents of the ICTY are Security Council Resolution 827, to which is annexed the Statute of the ICTY, SC Res. 827, UN SCOR, 48th Sess., Res. & Dec., at 29, UN Doc. S/INF/49 (1993), reprinted in 32 ILM 1203 (1993) [hereinafter ICTY Statute]; and the ICTY's Rules of Procedure and Evidence, which have been amended several times, most recently in July 1998. ICTY Rules of Procedure and Evidence, UN Doc. IT/32/Rev.13 (1998) [hereinafter ICTY Rule n]. Important commentary on the ICTY Statute may be found in the Secretary-General's report that laid the basis for Resolution 827. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), reprinted in 32 ILM at 1159 [hereinafter Report of the Secretary-General].

A useful source of information on the ICTY is the annual reports transmitted each August from the ICTY President to the Security Council and the General Assembly. See Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. A/52/375-S/1997/729 (1997) (fourth annual report); *id.*, UN Doc. A/51/292-S/1996/665 (1996) (third annual report); *id.*, UN Doc. A/50/365-S/1995/729 (1995) (second annual report); *id.*, UN Doc. IT/68 (1994) (first annual report). Further information may be found in the ICTY's *Yearbooks*; the *Yearbooks* covering 1994 and 1995 may be purchased from the United Nations Sales and Marketing Section, Room DC2-853, Dep't 1004, New York, NY 10017. 1995 ICTY Y.B., UN Sales No. E.96.III.P.1 (1996); 1994 *id.*, UN Sales No. E.95.III.P.2 (1995).

Secondary literature on the establishment and operation of the ICTY is already quite substantial. See, e.g., Symposium, *Prosecuting International Crimes: An Inside View*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1997); Symposium, *The International Tribunal for Former Yugoslavia Comes of Age*, 7 EUR. J. INT'L L. 245 (1996); M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1995); Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT'L L. & COM. 1 (1995). A recent, well-written report on the structure, process and resources of the ICTY is U.S. GENERAL ACCOUNTING OFFICE, *FORMER YUGOSLAVIA: WAR CRIMES TRIBUNAL'S WORKLOAD EXCEEDS CAPACITY* (U.S. Gov't Doc. GAO/NSIAD-98-134, 1998).

For a variety of information on the ICTY, including the *Yearbook* covering 1996, a useful resource is the ICTY Web site <<http://www.un.org/icty>>. Many of the decisions referred to in this discussion may be found there under "judicial decisions and orders." Unfortunately, many decisions are not available through the Web, but they can be obtained from the ICTY Press and Information Office, PO Box 138888, 2501 EW The Hague, Netherlands. The author understands, however, that the ICTY is currently arranging for a publisher in the Netherlands to reprint all ICTY judicial orders and decisions in the near future.

<sup>2</sup> Lawyers purporting to represent indictee Radovan Karadžić filed a motion prior to the Rule 61 hearing on his indictments. The motion requested that a lawyer representing Karadžić be permitted to sit in the courtroom during the hearing and to have access to the prosecution's evidence. The trial chamber denied the motion, stating that an indictee's attorney would receive such treatment as part of a trial only after the indictee has appeared in The Hague. Prosecutor v. Karadžić and Mladić, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Nos. IT-95-5-R61 and IT-95-18-R61, para.



into custody, he is tried by a different trial chamber. From October 1995 to July 1996, the ICTY conducted five Rule 61 hearings, culminating in a hearing and decision in July 1996 confirming two indictments against Radovan Karadžić and Ratko Mladić.<sup>3</sup>

Starting in mid-1996, however, the ICTY shifted away from simply issuing indictments and conducting Rule 61 hearings and toward trial of the accused. The first trial began in May 1996 in the *Tadić* case. At the same time, other indictees came into custody: four "Celebići Camp" indictees were arrested by Austria, Bosnia-Herzegovina, and Germany in mid-1996 and transferred to The Hague; and a Bosnian Croat indictee, General Tihomir Blaškić, voluntarily surrendered to the Tribunal in April 1996. Since mid-1996, the number of indictees in custody has steadily grown. As of December 1998, there were twenty-six indictees in the ICTY detention facility, one indictee released for medical reasons until the beginning of his trial, and one serving time in Norway.

Since 1997, the ICTY prosecutor has pursued a strategy that calls for indicting only high-level offenders and that avoids making any new indictments public.<sup>4</sup> To this end, the ICTY has continued investigating potential high-level indictees and has issued a few indictments under seal. Some of them became public when the indictee was taken into custody. (As of December 1998, there were twenty-two outstanding public indictments against fifty-six individuals.) In addition, the ICTY has continued to build on the database bequeathed to it by the Commission of Experts<sup>5</sup> by sending investigative teams into the field to interview witnesses and collect documents (which includes executing search warrants at relevant facilities); by conducting major investigations into mass grave sites and exhumations during the summers of 1996, 1997 and 1998; and by obtaining information from governmental and nongovernmental sources.

The reasons indictees are now in custody in The Hague are many. Some governments outside the former Yugoslavia have arrested indictees turning up in their territory and have transferred them to the ICTY. Diplomatic pressure on the Dayton

4 (July 11, 1996) [hereinafter *Karadžić and Mladić Rule 61 Decision*], reprinted in 108 ILR 85 (1998). But see Prosecutor v. Rajić, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, No. IT-95-12-R61 (Sept. 13, 1996) [hereinafter *Rajić Rule 61 Decision*], reprinted in 108 ILR at 141, summarized in Olivia Swaak-Goldman, Case note, 91 AJIL 523 (1997) (Sidhwa, J., sep. op., paras. 10-16) (arguing that the prosecutor's evidence should be made public, unless under a specific protective order).

On Rule 61 proceedings, see generally Mark Thieroff & Edward A. Amley, Jr., *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 YALE J. INT'L L. 231 (1998); Anne L. Quintal, Note, *Rule 61: The "Voice of the Victims" Screams Out for Justice*, 36 COLUM. J. TRANSNAT'L L. 723 (1998); Faiza Patel King, *Public Disclosure in Rule 61 Proceedings before the International Criminal Tribunal for the Former Yugoslavia*, 29 N.Y.U. J. INT'L L. & POL. 523 (1997).

<sup>3</sup> *Karadžić & Mladić Rule 61 Decision*, supra note 2. For the other reviews of indictments pursuant to ICTY Rule 61, see *Rajić Rule 61 Decision*, supra note 2; Prosecutor v. Mrkšić, Radić and Šijavančanin, No. IT-95-13-R61 (Apr. 3, 1996) [hereinafter *Vukovar Rule 61 Decision*], reprinted in 108 ILR 53 (1998), 36 ILM 908 (1997); Prosecutor v. Martić, No. IT-95-11-R61 (Mar. 8, 1996; revised Mar. 13, 1996) [hereinafter *Martić Rule 61 Decision*], reprinted in 108 ILR at 39; Prosecutor v. Nikolić, No. IT-94-2-R61 (Oct. 20, 1995) [hereinafter *Nikolić Rule 61 Decision*], reprinted in 108 ILR at 21.

<sup>4</sup> For the prosecutor's most recent statement on her strategy, see Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused, ICTY Doc. CC/PIU/314-E (May 8, 1998), in which she characterizes her strategy as "maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences."

<sup>5</sup> See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674 (1994); see also M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 279 (1994); M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AJIL 784 (1994).

TABLE 1. CURRENT STATUS OF TRIALS AT THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (December 18, 1998)

INDICTMENT	NAMES OF DEFENDANTS	TAKEN INTO ICTY CUSTODY	STATUS OF TRIAL
Tadić & Other	1. Duško Tadić (A-N)	April 1995	Convicted May 1997 and sentenced July 1997 to 20 years; appeal pending
Delalić & Others (Celebići Camp)	2. Hazim Delić (A-N)	June 1996	Convicted/sentenced to 20 years
	3. Esad Landžo (A-N)	June 1996	Convicted/sentenced to 15 years
	4. Zdravko Mucić (A-N)	April 1996	Convicted/sentenced to 7 years—all three above in November 1998
	<i>Zejnir Delalić (A-N)</i>	<i>May 1996</i>	<i>Acquitted/released November 1998</i>
Blaškić	5. Tihomir Blaškić (S)	April 1996	Trial hearing commenced June 1997 and remains ongoing
Kordić & Others (Aleksovski)	6. Zlatko Aleksovski (A-N)	April 1997	Trial commenced January 1998 and remains ongoing
Kordić & Others (Kordić & Čerkez)	7. Mario Čerkez (S)	October 1997	Pretrial motions filed; no trial date set
	8. Dario Kordić (S)	October 1997	
	<i>Pero Škopljak</i>	<i>October 1997</i>	<i>Released December 1997</i>
	<i>Ivan Sentić</i>	<i>October 1997</i>	<i>Released December 1997</i>
Kupreškić & Others	9. Drago Josipović (S)	October 1997	Trial commenced August 1998 and remains ongoing
	10. Mirjan Kupreškić (S)	October 1997	
	11. Vlatko Kupreškić (D-S)	December 1997	
	12. Zoran Kupreškić (S)	October 1997	
	13. Dragan Papić (S)	October 1997	
	14. Vladimir Sentić (S)	October 1997	
	<i>Marinko Katava</i>	<i>October 1997</i>	<i>Released December 1997</i>
Furundžija	15. Anto Furundžija (D-S)	December 1997	Convicted/sentenced to 10 years in December 1998
Jelišić (Brčko)	16. Goran Jelišić (D-S)	January 1998	Trial began December 1998 and remains ongoing
Miljković & Others (Bosanski Šamac)	17. Milan Simić (S)	February 1998	No trial date set; Simić provisional release for health reasons granted March 1998
	18. Miroslav Tadić (S)	February 1998	
	19. Simo Zarić (S)	February 1998	
	20. Stevan Todorović (D-S)	September 1998	
Gagović & Others (Foča)	21. Dragoljub Kunarac (S)	March 1998	No trial date set
Omarska & Keraterm Camps	22. Miroslav Kvočka (D-S)	April 1998	No trial date set
	23. Mladen Radić (D-S)	April 1998	
	24. Zoran Zigić (S)	April 1998	
	25. Milojica Kos (D-S)	May 1998	
Krnojelac (Foča)	26. Milorad Krnojelac (D-S)	June 1998	No trial date set
Krstić	27. Radislav Krstić (D-S)	December 1998	No trial date set
Erdemović	28. Drazen Erdemović (A-N)	March 1996	Pleaded guilty and sentenced to 5 years in March 1998; serving sentence in Norway
Others	Stipo Alilović	Died 1995	Indictments dropped
	Djorđe Đukić	Died 1996	
	Simo Drljača	Died 1997	
	Slavko Dokmanović	Committed suicide 1998	
	Milan Kovačević	Died 1998	
	Slobodan Miljković	Died 1998	

## KEY:

(A-N) = Arrested by national authorities

(D-S) = Detained by SFOR

(S) = Surrendered

states have also offered resources within their national criminal systems to assist the ICTY. For instance, in November 1997, the United Kingdom concluded an agreement with the ICTY for the relocation of witnesses endangered by testifying at the Tribunal.<sup>12</sup>

The duration and complexity of the ICTY trials can vary dramatically. The presentation of evidence in the *Tadić* trial lasted seven months (May–November 1996), during which the prosecution and defense called 116 witnesses and presented 386 exhibits in their initial presentations and called 10 witnesses in rebuttal. The English transcript of the trial runs to more than seven thousand pages. Presentation of evidence in the *Celebići Camp* trial required nineteen months (March 1997–October 1998), including the presentation of 122 witnesses by the parties, and generated more than sixteen thousand pages of English transcript. By contrast, the *Furundžija* trial—although reopened for some brief additional testimony—took only six days for its principal phase, in which a total of eight witnesses and twenty exhibits were presented, resulting in a transcript of just over seven hundred pages. Part of this difference derives from the ability of the ICTY to try cases more efficiently over time, as it hones its rules and procedures and builds up its jurisprudence and institutional knowledge. However, differences in trials also arise from the nature of the charges, since some cases involve fairly straightforward, isolated incidents with just a few witnesses, while others concern evidence of widespread and systematic activity across Bosnia-Herzegovina.

With the commencement of trials, there is now a substantial and growing corpus of substantive and procedural judicial decisions<sup>13</sup> that will affect not only the ICTY's own future work and that of its companion tribunal (the International Criminal Tribunal for Rwanda [ICTR]),<sup>14</sup> but also the work of the permanent international criminal court,<sup>15</sup> and that of national courts and tribunals when deciding cases in this area. Appreciation of this contribution is best developed by understanding the array of issues covered by the most significant ICTY decisions.

<sup>12</sup> United Kingdom Becomes First State to Agree to Provide Enhanced Assistance to Witness Protection Efforts of International Tribunal, ICTY Doc. CC/PIU/258-E (Nov. 7, 1997).

<sup>13</sup> For additional information on the jurisprudence of both the ICTY and the International Criminal Tribunal for Rwanda, see JOHN R. W. D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* (1998); William Fenrick, *The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, in *THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM* 77 (U.S. Naval War College International Law Studies, Vol. 71, Michael Schmitt & Leslie Green eds., 1998); Faiza Patel King & Anne-Marie La Rosa, *The Jurisprudence of the Yugoslavia Tribunal: 1994–96*, 8 EUR. J. INT'L L. 123 (1997).

<sup>14</sup> The ICTR was also established by the Security Council. SC Res. 955 (Nov. 8, 1994), *reprinted in* 33 ILM 1518 (1994). The ICTR is primarily based in Arusha, Tanzania; however, a large component of the prosecutor's office is located in Kigali, Rwanda. To promote the development of a uniform jurisprudence, the ICTY Chief Prosecutor also serves as the ICTR Chief Prosecutor, and the ICTY appeals chamber also hears appeals from the ICTR trial chambers. The ICTR's jurisprudence is also affecting the jurisprudence of the ICTY. See, e.g., *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Judgment, paras. 160, 176 (Dec. 10, 1998).

<sup>15</sup> The Statute of the International Criminal Court (ICC), *reprinted in* 37 ILM 999 (1998) [hereinafter: ICC statute], was adopted in Rome on July 17, 1998, by a "non-recorded vote" of 120-7-21. Like the ICTY, the statute provides that the ICC will be based in The Hague. The statute is open for signature through December 31, 2000, and enters into force after 60 states deposit their instruments of ratification or accession. For background, see *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* (M. Cherif Bassiouni ed., 1998); and the reports on the Preparatory Committee by Christopher Keith Hall in 91 AJIL 177 (1997), and 92 AJIL 124, 331, and 548 (1998). The text of the ICC statute, as well as other information on the ICC, may also be found on the Internet (<http://www.un.org/icc>).

## II. SIGNIFICANT ICTY DECISIONS AS OF DECEMBER 1998

The following recounts the most significant ICTY decisions to date, noting trends where applicable. The sections are arranged so as to follow loosely the path from the Tribunal's creation through the process of indicting, prosecuting, and sentencing. ICTY judicial decisions are not assigned specific numbers; they are identified simply by case name, case number<sup>16</sup> and the date of the decision. For purposes of this discussion, rather than repeat complete citations, for non-Rule 61 decisions an abbreviated reference to each case will be used in a parenthetical in the text,<sup>17</sup> plus the date of the decision.

*Establishment of the ICTY*

In 1993 the idea of creating an international criminal tribunal by means of a Security Council resolution was completely unprecedented. Thus, it was no surprise that, at the first opportunity, an indictee challenged the very existence of the Tribunal, essentially on the basis that the Security Council had exceeded its authority under Chapter VII of the UN Charter when it established such a judicial institution. Duško Tadić claimed that since the Council had exceeded its authority, the ICTY had not been "established by law," and therefore, under relevant human rights instruments, could not try him. The trial chamber found that it lacked authority to review its establishment by the Security Council and that, in any event, the matter was political and nonjusticiable in nature (*Tadić*, Aug. 10, 1995, paras. 8, 24). The appeals chamber, however, found that the ability of a judicial or arbitral tribunal to determine its own competence is a major part of its "incidental or inherent jurisdiction," and that Tadić's challenge presented a legal question capable of

<sup>16</sup> The case number begins with "IT" for "International Tribunal," followed by two digits reflecting the year of the indictment (e.g., "96") and by a further digit roughly reflecting the sequence within which the indictment was issued vis-à-vis other indictments. Different trials may have the same indictment number if the persons were grouped under the same indictment but tried separately. The case number shown on decisions usually ends with either a "T" if it is a trial chamber decision or an "A" if it is an appeals chamber decision, but on occasion other appellations are used (e.g., Rule 61 decisions, cited *supra* notes 2 and 3, end with "R61").

<sup>17</sup> In identifying the case, the following abbreviations will be used. Note that these abbreviations do not refer to specific decisions; rather, they refer to a case, for which there may be multiple orders or decisions that can be identified only through reference to the date on which the decision was issued.

*Aleksovski*: Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14;

*Blaškić*: Prosecutor v. Tihomir Blaškić, Case No. IT-95-14;

*Bosanski Šamac*: Prosecutor v. Milan Simić, Miroslav Tadić, and Simo Zarić, Case No. IT-95-9;

*Celebići Camp*: Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo, Case No. IT-96-21;

*Dokmanović*: Prosecutor v. Slavko Dokmanović, Case No. IT-95-13;

*Erdemović*: Prosecutor v. Dražen Erdemović, Case No. IT-96-22;

*Furundžija*: Prosecutor v. Anto Furundžija, Case No. IT-95-17;

*Jelić*: Prosecutor v. Goran Jelić, Case No. IT-95-10;

*Keraterm Camp*: Prosecutor v. Duško Sikirica, Damir Dosen, Dragan Fustar, Dragan Kulundžija, Nenad Benović, Predrag Banović, Dusan Knezević, and Zoran Zigić, Case No. IT-95-8;

*Kordić and Čerkez*: Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14;

*Kovačević*: Prosecutor v. Milan Kovačević, Case No. IT-97-24;

*Krnjelac*: Prosecutor v. Milorad Krnjelac, Case No. IT-97-25;

*Kunarac*: Prosecutor v. Dragoljub Kunarac, Case No. IT-96-23;

*Kupreškić*: Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Vladimir Santić, Drago Josipović, and Dragan Papić, Case No. IT-95-16;

*Omaraka Camp*: Prosecutor v. Zeljko Meakić, Miroslav Kvočka, Dragoljub Prcać, Mladen Radić, Milojica Kos, Momcilo Gruban, Dusan Knezević, and Zoran Zigić, Case No. IT-95-4; and

*Tadić*: Prosecutor v. Duško Tadić a/k/a "Dule," Case No. IT-94-1.

a legal answer (*Tadić*, Oct. 2, 1995, paras. 18–19, 24–25).<sup>18</sup> The appeals chamber determined that there had been a threat to the peace in the former Yugoslavia justifying the Security Council's invocation of Chapter VII of the Charter and, further, that Chapter VII served as an appropriate legal basis for establishing an international criminal tribunal. In reaching this conclusion, the appeals chamber brushed aside arguments that Chapter VII does not expressly envisage such a measure, that the Security Council cannot create a judicial organ, and that such an organ is not capable of promoting international peace.

The appeals chamber's decision is consistent with the post-Cold War practice of using the Security Council creatively to address conflict resolution. At the same time, the decision is consistent with—and perhaps serves as a precedent for—the sentiment expressed by many states and nonstate entities that there are limits to the authority of the Security Council, even when acting under Chapter VII, and that those limits may be assessed by appropriate judicial bodies. The appeals chamber found that the Council's actions (e.g., determining a “threat to the peace” and responding to that threat) were subject to constraints of legality, specifically those set forth in the UN Charter, and perhaps also in general principles of international law.<sup>19</sup> On the other hand, the precedential value of the ICTY's decision turns on whether one accepts that a subsidiary body of the Security Council can issue authoritative statements interpreting the Council's authority, or whether its role is limited simply to implementation of its mandate (i.e., the prosecution of war criminals).

#### *Authority vis-à-vis National Courts*

Article 9 of the ICTY Statute provides for the Tribunal's primacy over national courts.<sup>20</sup> All states, including those of the former Yugoslavia, are obligated to cooperate with the ICTY, which includes complying with orders to arrest nationals found within their territory and “deferral” to the ICTY, upon its request, of any proceedings against indictees in national courts (ICTY Statute Art. 29; *see also* ICTY Rules 7 *bis*–13, 56–58). A state “defers” to the primacy of the ICTY's jurisdiction when it transfers the indictee to ICTY custody for trial and discontinues the case in its national courts.

Several states have enacted national legislation allowing them to transfer indictees found in their territory to the ICTY, including the United States.<sup>21</sup> Indictes have been arrested by the Governments of Austria, Bosnia, Croatia and Germany, and transferred

<sup>18</sup> The appeals chamber's decision is reprinted in 35 ILM 32 (1996) and 105 ILR 419, 453 (1997). For analyses, see William Fenrick, *International Humanitarian Law and Criminal Trials*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 23 (1997); Christopher Greenwood, *International Humanitarian Law and the Tadić Case*, 7 EUR. J. INT'L L. 265 (1996).

<sup>19</sup> For an analysis of the standards of review applied by the ICTY, see Faiza Patel King, *Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers under Chapter VII of the Charter*, 10 EMORY INT'L L. REV. 509, 541–74 (1996) (finding that the ICTY “took the view that the Security Council, in creating the Tribunal as an enforcement measure under Article 41, was subject to certain limitations deriving from sources other than the Charter”).

<sup>20</sup> For a lucid discussion of this subject, see Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 394–416 (1988).

<sup>21</sup> See Robert Kushen & Kenneth J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AJIL 510 (1996). As of October 1998, the only indictee to have been located in the United States is an indictee of the ICTR, who is contesting in federal court the constitutionality of his transfer to Arusha. *See In re Surrender of Ntakirutimana*, 988 F.Supp. 1038 (S.D. Tex. 1997) (order by federal magistrate that the indictee could not be transferred). In August 1998, a federal district court judge ordered the transfer; that order is now being challenged on a habeas petition by Ntakirutimana's lawyer, Ramsey Clark.

of international or internal armed conflict. However, through a narrow interpretation of Article 2, the appeals chamber has declared that the most heinous of crimes against protected persons, reflected in the grave breaches provisions of the 1949 Conventions, may be charged only where the prosecutor can prove the existence of an international armed conflict. Perhaps reasonable minds can differ on the interpretation of Article 2 of the Statute, but one can only lament that, by establishing a narrow scope for Article 2 and an expansive scope for Article 3, the judges have significantly diminished the likelihood of the prosecutor's seeking to stigmatize heinous acts against protected persons as grave breaches of international humanitarian law.

*Genocide.* Article 4 of the ICTY Statute reproduces the provisions defining genocide that appear in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Unfortunately, while genocide charges have been included in several of the indictments issued by the ICTY, the only trial to date containing such a charge was that of *Žovachević*, which was aborted when he died in August 1998. Consequently, as yet there is no significant ICTY jurisprudence on the application of the prohibition of genocide.<sup>35</sup>

*Crimes against humanity.* Article 5 of the ICTY Statute, entitled "Crimes against humanity," proscribes specified crimes (such as murder, deportation, torture, rape and persecution on political, racial or religious grounds) "directed against any civilian population" when committed in armed conflict. An important aspect of its jurisprudence is the development by the Tribunal of the meaning and scope of crimes against humanity.

To establish a violation under Article 5, the appeals chamber found in the *Tadić* case that an armed conflict must exist (under customary international law this is not required), but that it makes no difference whether the armed conflict is international or noninternational in character (*Tadić*, Oct. 2, 1995, para. 141). The alleged crime need not be connected with a crime against the peace or a war crime (*id.*, paras. 139–40). With respect to the nexus between the alleged crime and the armed conflict, the *Tadić* trial chamber found that, in addition to having to occur during the course of the conflict, the crime must be linked geographically with the armed conflict. In addition, the perpetrator's motives must be in furtherance of the armed conflict (i.e., not personal) (*Tadić*, May 7, 1997, paras. 633–34).

The *Tadić* trial chamber clarified the requirement that the crime be "directed against any civilian population." First, "directed" does not mean that the crime must be associated with a formal state policy against a civilian population; evidence of an informal policy by nonstate actors will be sufficient (*id.*, paras. 653–54). Second, the targeted population must be of a "predominantly civilian nature," but the term "civilian" is to be liberally construed and the presence of some noncivilians will not be disqualifying (*id.*, paras. 638, 643). Finally, although not explicitly required by Article 5, the trial chamber found

that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement imported by the Secretary-General and members of the Security Council that the actions be taken on discriminatory grounds. (*Id.*, para. 644)

Consequently, isolated or random acts cannot rise to the level of a crime against humanity, although it is possible for a single act by an indictee to constitute such a crime,

<sup>35</sup> By contrast, in September 1998, the ICTY's sister tribunal, the ICTR, both convicted an indictee of genocide (a former mayor, Jean-Paul Akayesu) and sentenced an indictee to life imprisonment after he pleaded guilty to genocide (former Rwandan Prime Minister Jean Kambanda). See James C. McKinley, Jr., *Ex-Rwandan Premier Gets Life in Prison on Charges of Genocide in '94 Massacres*, N.Y. TIMES, Sept. 5, 1998, at A4.

if it is a part of a widespread *or* (not *and*) systematic attack.<sup>36</sup> Further, to sustain any charge based on a crime against humanity, the prosecutor must show discriminatory intent on the part of the indictee, such as evidence that the attack on a civilian population was conducted against a certain political or racial group only because of its affiliation.

One of the acts specified in Article 5 is persecution based on political, racial or religious grounds. In finding Tadić guilty of the crime of persecution under Article 5, the trial chamber stated that a charge of persecution may arise from acts that are criminal under other articles of the ICTY Statute, but declined to allow charges of persecution when based on acts that are found to be crimes against humanity under the other heads of Article 5 (*id.*, paras. 699–702). In other words, if the prosecutor successfully proves a crime against humanity under one of the other Article 5 headings (e.g., murder or rape), which themselves require a showing of discriminatory intent, a further charge of persecution will not be allowed, as it would be duplicative. Further, the crime of persecution can be based on acts not deemed criminal by other articles of the ICTY Statute, such as employment discrimination, “so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present” (*id.*, para. 707).<sup>37</sup>

#### *Attribution of the Crime to an Individual*

Article 7(1) of the ICTY Statute provides that a person who “planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime” shall be individually responsible for the crime. The Statute leaves open, however, the necessary degree of participation by the individual in the crime. The trial chamber in *Tadić* found that, where the accused did not directly engage in the alleged actions, that person may still be held responsible if the prosecutor proves (1) that he or she consciously participated by planning, instigating, ordering, committing, or otherwise aiding and abetting the crime; and (2) that such participation directly and substantially contributed to the commission of the crime (*id.*, paras. 674, 692). The chamber also stated:

The Trial Chamber finds that aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it.

. . . .

. . . [A]ctual physical presence when the crime is committed is not necessary . . . . However, the acts of the accused must be direct and substantial. (*Id.*, paras. 689–91)

In the *Furundžija* case, the trial chamber conducted an extensive analysis, drawing on a variety of international law sources, to determine both the *actus reus* and the *mens rea* necessary to sustain a charge of aiding and abetting in international criminal law. The chamber held that “the *actus reus* consists of practical assistance, encouragement, or

<sup>36</sup> *Vukovar Rule 61 Decision*, *supra* note 3, para. 30.

<sup>37</sup> For further discussion of both the ICTY's and the ICTR's jurisdiction, see Marie-Claude Roberge, *Jurisdiction of the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda over Crimes against Humanity and Genocide*, 37 INT'L REV. RED CROSS 651 (1997).

moral support which has a substantial effect on the perpetration of the crime," while the "*mens rea* required is the knowledge that these acts assist the commission of the offence" (*Frundžija*, Dec. 10, 1998, para. 249).

In addition to this "direct responsibility," Article 7(3) of the ICTY Statute provides for "superior responsibility" for the acts of a subordinate when the superior "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." In the *Blaskić* case, defense counsel sought through a pre-trial motion to clarify the *mens rea* standard contained in Article 7(3), arguing that there needed to be either actual knowledge of the acts or wanton disregard of facts compelling a conclusion that the acts were about to be or had been committed. The trial chamber, however, preferred to hold the matter over for consideration as part of the trial (*Blaskić*, Apr. 4, 1997). In the same decision, the chamber rejected the defense's argument that criminalizing the "failure to punish perpetrators" was an *ex post facto* development of international humanitarian law.

In the *Celebići Camp* case, the trial chamber found that the doctrine of command responsibility encompasses not only military commanders, but also civilians holding positions of authority, and can have a *de facto* as well as a *de jure* character (*Celebići Camp*, Nov. 16, 1998, paras. 363, 378). In that case, the chamber convicted Zdravko Mucić on several counts of murder and torture on a theory of command responsibility emanating from his position as commander of the Celebići camp. According to the trial chamber, Mucić had a duty to ensure the proper treatment of prisoners at his camp and was derelict in that duty by allowing those under his authority to commit heinous offenses, without taking any disciplinary action against them. At the same time, when sentencing, the chamber took into account as a mitigating factor that Mucić had not been named by any witness as an active participant in any of the murders or tortures for which he was charged with responsibility as a superior. By contrast, the trial chamber acquitted Zejnir Delalić of all charges of command responsibility, finding that he had not exercised sufficient command and control over the Celebići camp. Delalić's relationship to the camp was more tenuous than Mucić's; Delalić had served both as the "co-ordinator" of the Konjić municipality in which the camp was located and as the commander of a tactical group of the Bosnian armed forces operating in the area.

### *Indictments*

Under ICTY Rule 47, the prosecutor prepares and forwards an indictment to the registrar for confirmation by an ICTY judge if there is "sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal." The indictment sets forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime for which the suspect is charged. If the indictment is confirmed, under ICTY Rule 55 the judge signs a warrant of arrest, which is then transmitted to the national authorities of the state(s) where the indictee is thought to reside.

Virtually all the indictees brought before the ICTY have challenged the form of the indictment against them, mostly on grounds that the charges were too vague or overlapping. On occasion, the trial chambers have accepted some of these contentions. For instance, in the *Tadić* trial, the trial chamber agreed that certain counts charging a "course of conduct" against the civilian population set forth acts that were too general and did not provide the accused with any specific, concise statement of the underlying



facts (*Tadić*, Nov. 14, 1995). After upholding the challenge, however, the chamber provided the prosecution with an opportunity to amend the indictment to address the problem. For the most part, the trial chambers have denied motions charging that an indictment is defective (e.g., *Aleksovski*, Sept. 25, 1997) and these decisions have been upheld when appealed (e.g., *Celebići Camp*, Nov. 15, 1996). The appeals chamber has applied a standard that simply calls for each count of the indictment to be clear on which serious violation of international humanitarian law is being charged (e.g., *Celebići Camp*, Dec. 6, 1996). Further, the prosecutor is not barred from bringing cumulative charges based on different articles of the ICTY Statute where those articles are designed to protect different values and where one article requires proof of a legal element not required by the others (*Kupreškić*, May 15, 1998).

*Amending an indictment.* For the most part, trial chambers have allowed the prosecutor to amend indictments under ICTY Rule 50. Indeed, in the *Nikolić* case, a trial chamber invited such amendment, although the propriety of a trial chamber's doing so (at least one that will sit in judgment on the case) is unclear. In some cases, the prosecutor has simply sought to withdraw certain counts against the accused (e.g., *Jelisić*, May 12, 1998), or to take certain administrative steps, such as removing an accused who is deceased from a joint indictment (e.g., *Kovačević*, May 12, 1998) or severing cases against persons in custody from those still at large (e.g., *Kunarac*, Aug. 25, 1998; *Bosanski Šamac*, Aug. 25, 1998). Often, however, the prosecutor has amended the indictment to add counts as well as to clarify existing counts, which is necessary when new information comes to light between the time the first indictment is issued and the indictee goes to trial. For example, in *Blaškić*, the prosecutor amended the October 1996 indictment twice (in November 1996 and April 1997), to make it more specific in nature, but also more expansive in both temporal and geographical terms, adding six new counts. The final amendment was made one year after *Blaškić* was taken into custody. Sometimes, the additional counts are far from insignificant; for instance, the trial chambers in the *Kupreškić* and the *Kordić and Čerkez* cases allowed the prosecutor to add counts of crimes against humanity (*Kupreškić*, Mar. 10, 1998; *Kordić and Čerkez*, Sept. 30, 1998). Under ICTY Rule 50, as amended, any amendment is considered by the same judge who originally confirmed the indictment or by another specially designated judge, but not by the trial chamber to which the case is assigned.

In one instance, a trial chamber refused to allow any amendment of an indictment. In the *Kovačević* case, the chamber ruled that allowing the prosecutor to amend the indictment in a broad and substantial way, almost a year after the original indictment had been confirmed and seven months after the arrest of the accused, would serve to deny him access to a fair and speedy trial. The chamber noted that the amendment would add fourteen counts and factual allegations that would increase the size of the indictment from eight to eighteen pages (*Kovačević*, Mar. 5, 1998). The prosecutor, however, successfully brought this decision to the appeals chamber, which ordered that the amendment be allowed (*Kovačević*, May 29, 1998) and then issued a reasoned opinion (*Kovačević*, July 2, 1998). The appeals chamber found that increasing the size of an indictment does not per se make an amendment unjust; an injustice must be shown that cannot be cured by disallowing some portion of the amendment. Further, given that the prosecution had signaled its intention to amend the indictment early in the proceedings and that the defense had failed to object, the appeals chamber did not find any delay resulting from the amendment to be unfair to the indictee's ability to prepare a defense. The chamber noted that the indictee had been informed of the existing charges at the time he was taken into custody, and that there is no rule of customary international law, outside the field of extradition, prohibiting the prosecution from thereafter developing further charges.

*Sealed indictments.* When submitting an indictment to a judge for confirmation, the prosecutor may request under ICTY Rule 53 that the indictment not be publicly disclosed, on grounds that doing so would make it more likely that the accused would evade apprehension. Because of the inability or unwillingness of the states of the former Yugoslavia to transfer indictees to The Hague, the ICTY prosecutor since 1997 has sought confirmation only of sealed indictments. Consequently, while the number of persons publicly indicted is known, the number of persons indicted under seal is not.

The existence of sealed indictments is apparent from the unsealing of those indictments once the subjects have been taken into custody. Anto Furundžija was indicted under seal by the ICTY on November 10, 1995. After he was detained on December 18, 1997, by SFOR and transferred to The Hague, a redacted copy of the indictment was unsealed, since other person(s) on the indictment remained at large. Dokmanović's name was added under seal to an existing public indictment on April 3, 1996. After Dokmanović was arrested by the prosecutor, in cooperation with UNTAES, on June 27, 1997, his association with the indictment was made public. Simo Drljača and Kovačević were indicted under seal on March 13, 1997. After Drljača was shot and killed when resisting detention by SFOR, and Kovačević was detained by SFOR and transferred to The Hague on July 10, 1997, the indictment against them was made public.

None of these three indictees challenged as unlawful the fact that they were indicted under seal. Dokmanović sought to use that fact as a means of challenging the legality of his arrest, arguing that the state in which he resided had had no opportunity to arrest him, and that resort to arrest in cooperation with UNTAES was therefore unlawful. The trial chamber, however, found that the ICTY Statute and Rules did not require such disclosure, that the FRY's history of noncompliance with other public indictments justified issuing this indictment under seal, and that, in any event, Dokmanović was residing in Croatia at the time he was indicted under seal and only subsequently moved to Serbia (*Dokmanović*, Oct. 22, 1997).

*Withdrawal of charges.* The trial chambers may grant leave under ICTY Rule 51 for the prosecutor to withdraw charges against indictees. An obvious situation where withdrawal is appropriate is when the indictee is determined to have died (*e.g.*, *Kupreškić*, Dec. 23, 1997). More significantly, the prosecutor was permitted to withdraw charges against three persons after they were taken into custody, having determined that the evidence against them was insufficient to proceed with a trial (*Kupreškić*, Dec. 19, 1997; *Kordić and Čerkez*, Dec. 19, 1997). Concerned that persons should not have indictments hanging over them if not supported by evidence, the trial chamber in *Kupreškić*, when approving the withdrawal of charges, stated that it expected "that in the future, the Prosecution will act expeditiously on matters of such fundamental importance as the liberty of the accused."

In May 1998, the ICTY withdrew charges against fourteen persons not yet in custody who were covered by two indictments (*Keraterm Camp*, May 5, 1998; *Omaraka Camp*, May 8, 1998). The prosecutor stated that the decision to seek withdrawal was based on the need to focus the resources of the Tribunal on persons holding higher levels of responsibility than had been held by these accused. She stated that "this decision is not based on any lack of evidence in respect of these accused. I do not consider it feasible at this time to hold multiple separate trials for related offenses committed by perpetrators who could appropriately be tried in another judicial forum, such as a State Court."<sup>38</sup> The

<sup>38</sup> Statement by the Prosecutor Following the Withdrawal of the Charges Against the 14 Accused, *supra* note 4.

prosecutor also stated that she had reviewed all the other indictments and did not contemplate any further withdrawals of charges.

### *Trials in Absentia*

When the ICTY was established, the Security Council consciously decided not to authorize the conduct of trials where the defendant was not present (trials *in absentia*).<sup>39</sup> Consequently, although the ICTY Statute does not expressly prohibit trials *in absentia*, implicitly it does so in Articles 20–21, which provide that a trial will proceed once the defendant is “taken into custody” and that one of the defendant’s rights is “to be tried in his presence.”

Early in the ICTY’s existence, the lack of indictees in custody led some to consider whether the Tribunal might nevertheless hold trials *in absentia*, perhaps by liberally construing an indictee’s waiver of his rights or by amending the ICTY Rules.<sup>40</sup> However, with numerous indictees now in custody, and the Office of the Prosecutor and the ICTY judges fully engaged in investigations and trials, the likelihood of trials *in absentia* is low. In 1997 the appeals chamber held that,

generally speaking, it would not be appropriate to hold *in absentia* proceedings against persons falling under the primary jurisdiction of the International Tribunal. . . . Indeed even when the accused has clearly waived his right to be tried in his presence (Article 21, paragraph 4(d) of the Statute), it would prove extremely difficult or even impossible for an international criminal court to determine the innocence or guilt of that accused. (*Blaskić*, Oct. 29, 1997, para. 59)

The chamber, however, did find that proceedings *in absentia* may be warranted in cases involving contempt of court by a witness (see ICTY Rule 77).

### *Apprehension of Indictee*

When confirming an indictment, the judge normally signs a warrant of arrest directed to the state(s) in which the indictee is thought to reside. If the indictment is under seal, however, the warrant may be directed only to authorities that might be in a position to detain the accused (such as the prosecutor or SFOR).

As of December 1998, eighteen indictees had been forcibly apprehended and transferred to The Hague. Eight had been arrested by national law enforcement authorities and transferred to the ICTY (Aleksovski, Delalić, Delić, Erdemović, Landžo, Mucić, Tadić and Zigić). Nine had been “detained” by SFOR and arrested by the prosecutor (Furundžija, Jelisić, Kos, Kovačević, Krnojelac, Krstić, Vlatko Kupreškić, Kvočka and Radić). One indictee (Dokmanović) had been arrested either by the prosecutor “in cooperation with” UNTAES (the prosecutor’s interpretation) or by UNTAES (the trial chamber’s interpretation).

Dokmanović challenged the authority of the prosecutor to arrest him. Prior to his arrest, Dokmanović, who resided in the FRY, had contacted the prosecutor about providing evidence to the ICTY. In the course of that contact, Dokmanović expressed an interest in meeting with the UNTAES Transitional Administrator in Croatia to discuss compensation for the loss of Dokmanović’s property in Croatia. When such a meeting was set up, Dokmanović crossed the border from Serbia, where he was picked up by an UNTAES vehicle. Upon arriving at an UNTAES base, Dokmanović was handcuffed by UNTAES soldiers, advised of his rights by an ICTY prosecutor, and flown to The Hague

<sup>39</sup> See Report of the Secretary-General, *supra* note 1, para. 101.

<sup>40</sup> See Thieroff & Amley, *supra* note 2, at 260.

by UNTAES. Prior to his trial, Dokmanović contended that his arrest was illegal for various reasons, the most important of which were (1) that the FRY alone had the power to arrest him; and (2) that, in essence, he had been "kidnapped" under false pretenses and the arrest was therefore illegal.

The trial chamber found that Dokmanović had been arrested the moment he arrived at the UNTAES base in Croatia, since that is where his freedom of movement was restricted (*Dokmanović*, Oct. 22, 1997). Thus, he had not been arrested in Serbia and it could not be argued that the FRY alone had the power to arrest him. Moreover, the relevant language in the ICTY Statute (Article 20) on taking an indictee into custody is not restricted to arrests by states. Noting that the FRY had failed to fulfill its obligation of arresting and transferring indictees to the ICTY, the trial chamber found it appropriate for the prosecutor to pursue other means of arrest. Further, since UNTAES was an international authority granted extensive powers within Croatia by the Security Council, and was mandated to cooperate with the ICTY, use of UNTAES to execute the arrest was appropriate. Indeed, although the prosecutor did not so argue, the chamber took the position that UNTAES itself had arrested Dokmanović, not the ICTY prosecutor.

With respect to Dokmanović's claim that he had been "kidnapped," the trial chamber analyzed whether the arrest was arbitrary in violation of human rights norms. After reviewing international and national case law, the chamber found strong support for the notion that luring a suspect into another jurisdiction so as to arrest him is not an abuse of his rights or an abuse of process, so long as an extradition treaty is not being circumvented and no unjustified violence is used. Since Dokmanović was taken into custody in accordance with normal procedures (e.g., having been informed of the charges against him), his arrest was justified and legal. The appeals chamber rejected an application by Dokmanović for leave to appeal the trial chamber's decision (*Dokmanović*, Nov. 11, 1997).

On occasion, persons thought to have been indictees have been arrested, transferred to The Hague, and then determined by the prosecutor to have been mistakenly identified (see, e.g., *Keraterm Camp*, June 17, 1996). In July 1998, SFOR troops detained two persons believed to be indictees, with the assistance of Bosnian government authorities. After their transfer to The Hague, however, the prosecutor determined that they were not indictees. As a means of explaining such mistakes, the prosecutor released a statement saying, inter alia:

Following certain comments which are being made concerning the recent arrest by SFOR of two persons who had not been indicted by this Tribunal, the Prosecutor wishes to point out that several of the accused who have been arrested by SFOR this year, have had in their possession when arrested, false official identity papers, including photographs, issued by various Republika Srpska authorities. This demonstrates that not only is Republika Srpska avoiding its legal obligations [to arrest and surrender indicted persons], including those under the Dayton Peace Agreement, but has also been engaged in deliberately frustrating the Tribunal's work by issuing false identification papers to those persons indicted by the Tribunal in an attempt to shield them from the Tribunal's jurisdiction.<sup>41</sup>

The day after their detention, the two indictees were transported by SFOR back to Bosnia-Herzegovina.

<sup>41</sup> False Identifications, ICTY Doc. CC/PIU/336-E (July 24, 1998).

*The Right to Remain Silent*

Under Article 21 of the ICTY Statute and ICTY Rules 42 and 63, a suspect or indictee has the right to remain silent, but can waive that right, as well as the right to counsel. If a suspect or indictee waives the right to be silent, it may be difficult at a later stage to exclude from evidence any statement given to prosecuting authorities. In the *Celebići Camp* case, Esad Landžo and Mucić were unable to exclude statements made to the prosecutor after their transfer to The Hague (*Celebići Camp*, Sept. 1, 1997; Sept. 2, 1997). Mucić, however, was successful in excluding an interview by Austrian police (who initially apprehended him) because the trial chamber found "that the Austrian rights of the suspect are so fundamentally different from the rights under the International Tribunal's Statute and rules as to render the statement . . . inadmissible."

*Pretrial Motions*

After the initial appearance of the indictee, the trial chamber holds a status conference (ICTY Rule 65 *bis*). Either the indictee or the prosecutor may file pretrial motions before the chamber for appropriate rulings. Such rulings may involve challenges or amendments to the indictment, as discussed above, or other matters requiring disposition before the trial. Once pretrial motions are resolved, the trial chamber holds a pretrial conference to hear how both sides intend to proceed at trial (ICTY Rule 73 *bis*).

Initially, pretrial motions were handled by the entire trial chamber. However, in June 1998, a single pretrial judge was appointed for the *Kunarac* case to rule on all pretrial proceedings, save motions relating to jurisdiction and other matters arising under ICTY Rule 72 (*Kunarac*, June 22, 1998). The pretrial judge is supposed to help ready the case for trial, and in doing so, to report regularly to the full trial chamber, which retains overall control of the case. This approach was formalized within the ICTY Rules by the adoption of Rule 65 *ter* on July 9–10, 1998, and may now be followed for all ICTY trials. At the same time, the ICTY amended its Rules to require certain time limits for the filing of defense preliminary motions, as well as for the disclosure of documents by the prosecutor and the advance submission to the trial chamber of information relating to admissions, contested matters, witnesses and exhibits (ICTY Rules 72 and 73 *bis*).

*Conditions of Detention/Provisional Release*

For the most part, indictees brought into custody in The Hague are held at the ICTY detention facility, located within a local Dutch prison. In some "exceptional circumstances," the ICTY can order indictees to be incarcerated outside the detention facility or to be provisionally released from custody, under ICTY Rule 65.

The trial chambers, however, have been very reluctant to grant provisional release to indictees that come into ICTY custody, whether by arrest or surrender (*e.g.*, *Aleksovski*, Jan. 23, 1998). As a general matter, both the prosecution and the judges have been concerned that provisionally released indictees might not return to The Hague, even if they had voluntarily surrendered (*e.g.*, *Kupreškić*, Dec. 15, 1997), or might seek to intimidate prosecution witnesses while at liberty.

On April 1, 1996, Tihomir Blaškić surrendered to the ICTY. In recognition of this voluntary surrender, ICTY President Antonio Cassese issued an order on April 3 permitting Blaškić to be incarcerated, at his own expense, in a residence in The Hague (*Blaškić*, Apr. 3, 1996). President Cassese established a number of conditions of this house arrest,

which were subsequently modified (*Blaškić*, Apr. 17, 1996; May 9, 1996; Jan. 9, 1997).<sup>42</sup> Those conditions spelled out how and when Blaškić could meet with his attorney, his wife and children, and others, and how he could communicate with the outside world. Once his trial commenced, however, Blaškić was returned to the ICTY detention facility.

Blaškić also sought provisional release even from house arrest for various reasons: the quality of the evidence against him, his voluntary surrender, his family situation, guarantees by the Croatian Government that he would return when requested, a willingness to pay a bail bond, and the length of his pretrial detention. Nevertheless, the trial chamber found no "exceptional circumstances" warranting provisional release; indeed, the chamber stated that "it may order provisional release only in very rare cases in which the condition of the accused, notably the accused's state of health, is not compatible with any form of detention" (*Blaškić*, Apr. 24, 1996; Dec. 20, 1996). The ICTY also denied a request for the temporary release of Mladen Radić to attend his brother's funeral in the Republika Srpska (*Omarška Camp*, July 8, 1998).

Similarly, in the *Celebići Camp* trial, all four indictees sought provisional release without success. With respect to the defendant Delalić, the trial chamber drew on the jurisprudence of the European Court and Commission of Human Rights to conclude that the indictee bears the burden of establishing the existence of "exceptional circumstances" that would warrant provisional release. The chamber found no such circumstances, noting further that there was a reasonable suspicion that Delalić had committed the crime and a risk of flight if he were released, notwithstanding an assurance by the Government of Bosnia-Herzegovina that it would make him available for trial if released to its custody (*Celebići Camp*, Sept. 25, 1996). The other defendants in the *Celebići Camp* case were also denied provisional release (see, e.g., *Celebići Camp*, Oct. 24, 1996; Nov. 22, 1996). The appeals chamber rejected Delić's application for leave to appeal the decision below on the grounds that the matter was not within its interlocutory jurisdiction (*Celebići Camp*, Nov. 22, 1996). A trial chamber also refused to allow the provisional releases of Kovačević and Vlatko Kupreškić, which were sought for health reasons (*Kovačević*, Jan. 16, 1998; *Kupreškić*, May 15, 1998).

A trial chamber did order the provisional release of ailing Bosnian Serb indictee Djukić when it became clear that advanced cancer would soon claim his life. A trial chamber also ordered the provisional release of wheelchair-bound Milan Simić because of "exceptional circumstances relating to the health of the accused." The chamber's decision was taken after the prosecutor reached agreement with Simić on the conditions of his release and received assurances from authorities of the Republika Srpska regarding his return to The Hague (together with a letter of guarantee for \$25,000). The conditions of his release included remaining in the municipality of Bosanski Šamac at all times; meeting there regularly with the local police; returning to The Hague at his own expense to be present for any proceedings; surrendering his passport to the International Police Task Force in Bosnia-Herzegovina or to the ICTY's Sarajevo office; and refraining from any contacts whatsoever with any person who might testify at his trial (*Bosanski Šamac*, Mar. 26, 1998; see also May 8, 1998). Simić had surrendered voluntarily to the ICTY in February 1998.

#### *Ancus Curiae Presentations*

A trial chamber or the appeals chamber may invite or grant leave to a state, organization or person to file a written submission on any issue before the chamber. Numerous

<sup>42</sup> These decisions are reprinted in 108 ILR 68 (1998).

such amicus submissions have been filed in the *Blaškić*, *Erdemović*, and *Tadić* cases, and several amicus groups or persons have been permitted to make oral presentations to the trial chamber as well.

The ICTY has not permitted the submission of amicus briefs at its Rule 61 hearings, apparently on the theory that their purpose is solely for the prosecutor to present the evidence. Thus, Croatia was refused permission to file an amicus brief on whether there was an international armed conflict between Croatia and Bosnia-Herzegovina during the Rule 61 hearing on atrocities in Stupni Do (*Rajić Rule 61 Decision*, *supra* note 2).

### *Non Bis in Idem*

Article 10 of the ICTY Statute provides that national courts cannot try a person for acts for which he was already tried by the ICTY; and, conversely, that the ICTY cannot try a person already tried by a national court for a violation of international humanitarian law, unless the national proceedings were not impartial or independent, or were essentially a charade. Such an approach is referred to as the principle of *non bis in idem* (not twice for the same).<sup>43</sup>

Tadić challenged the ICTY's ability to prosecute him on the grounds that to do so would be against the principle of *non bis in idem*. The trial chamber rejected this contention, essentially because he had not been tried in Germany prior to his transfer to The Hague, and because once the ICTY completed its proceedings, he could not be tried in Germany for the same alleged crimes (*Tadić*, Nov. 14, 1998).

It should be noted that if an indictee is acquitted by the ICTY, the prosecutor may appeal under Article 25 of the ICTY Statute. If the appeal is successful, then the indictee presumably may be tried a second time for the same crime by the trial chamber that had initially found him innocent.

### *Joint Trials*

So long as they relate to the "same transaction," multiple indictees may be tried jointly, and multiple charges against the same indictee may be joined in the same case (ICTY Rules 48, 49 and 82). The first trial involving multiple defendants was *Celebići Camp*, which involved four defendants charged with crimes against Bosnian Serb detainees. The accused were each assigned counsel. Two of the defendants, Delalić and Mucić, sought a separate trial from the other two, arguing that the charges against themselves were primarily ones of command responsibility, which placed them in a different position. The trial chamber, however, found that there was no "conflict of interests that might cause serious prejudice to an accused," or any need for severance "to protect the interests of justice" (*Celebići Camp*, Sept. 25, 1996). Similarly, the trial chamber in *Kupreškić* refused motions by Vlatko and Zoran Kupreškić for separate trials (*Kupreškić*, May 15, 1998).

Nevertheless, the trial chambers are not always interested in trying groups of indictees together or in the concurrent presentation of evidence relevant to two different trials. The most obvious situation in which a single trial does not make sense is when not all of the accused named in the indictment are in custody. Thus, a trial chamber granted Zlatko Aleksovski's request that he be tried separately from his co-accused since the others remained at large, with the exception of Blaškić, whose trial had already commenced (*Aleksovski*, Sept. 25, 1997).

<sup>43</sup> The principle of *non bis in idem* is similar to, but different from, the prohibition on "double jeopardy" in common law countries. *Non bis in idem* addresses the possibility of repeated prosecutions for the same conduct in different legal systems, whereas double jeopardy generally refers to repeated prosecutions for the same conduct in the same legal system.

Even when a group of indictees with related charges are in custody, the trial chamber may not view joinder or the concurrent presentation of evidence as appropriate. Zoran Žigić, Miroslav Kvočka and Radić were all charged with alleged crimes committed at Ožarska camp; Žigić was additionally separately charged with alleged crimes committed at Keraterm camp. Further, Kovačević was charged with alleged crimes committed at the Ožarska, Keraterm and Trnopolje camps. In April 1998, the prosecutor filed a motion seeking to join the trials of Žigić, Kvočka and Radić, and for the concurrent presentation of evidence relevant to all four of the accused. The trial chamber recognized that some of the witnesses called to testify would suffer hardship by having to repeat their testimony in three separate trials. However, the chamber found that either a joint trial or the concurrent presentation of evidence in those cases (which was tantamount to a joint trial) "may lead to a conflict of interests between the accused in conducting their defence" and "would cause serious prejudice to all the accused." Apparently, this prejudice arose from the fact that the crime of genocide, with which Kovačević was charged, differs in gravity from the crimes against the other accused, as does the relevant evidence. Furthermore, since Kovačević had been taken into custody well before the other accused and was ready to proceed to trial, whereas the others were not, joinder would have violated his right to an expeditious trial. Consequently, both motions were rejected (*Kovačević*, May 14, 1998).

### *Evidentiary Matters*

*Admission of evidence.* With respect to the admission of evidence, the ICTY trial chambers have said that they are charting a course somewhere between the common law tradition of carefully controlling the admission of evidence and the civil law tradition (which does not involve potentially prejudicing a jury) of allowing virtually any information to be presented. In considering the admission of hearsay evidence, one trial chamber has said that

neither the rules issuing from the common law tradition in respect of the admissibility of hearsay evidence nor the general principle prevailing in the civil law systems, according to which, barring exceptions, all relevant evidence is admissible, including hearsay evidence, because it is the judge who finally takes a decision on the weight to ascribe to it, are directly applicable before this Tribunal. The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to the Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system. (*Blaškić*, Jan. 21, 1998; see also *Tadić*, Aug. 5, 1996)

Despite this stated approach of charting a middle course, the trial chambers have shown little tendency to exclude evidence, including hearsay evidence. Thus, the basic rule of evidence applied by each trial chamber is to "admit any relevant evidence which it deems to have probative value" (ICTY Rule 89(c)), unless there is a specific reason to question its reliability (ICTY Rule 95). Moreover, the trial chambers have the option of ordering that a witness appear and testify, even if he or she was not called by either the prosecutor or the defense (ICTY Rule 98), as was ordered in the *Kupreškić* case with respect to an in-court witness (*Kupreškić*, Sept. 30, 1998).

In practice, most information submitted at trial is allowed into evidence; the weight the trial chamber then gives to the evidence in reaching a verdict turns on its credibility and relevance. For instance, a statement made under oath to an ICTY investigator by a witness who subsequently died was admitted into evidence by the Tribunal (*Blaškić*, Apr. 29,



1998).<sup>44</sup> Of course, the preferred approach for dealing with a witness who cannot testify in The Hague would be for testimony to be taken either by live video conferencing (discussed below) or by written or video-conferenced deposition, which would enable counsel for both parties to question the witness (ICTY Rule 71).

The ICTY is increasingly allowing the introduction of expert evidence by expedited means. In the initial trials of Tadić and Blaškić, there was extensive testimony from the stand by experts on the history of the conflict in Yugoslavia, past and present, as well as on the civilian and military command structures of the various factions during the 1990s. Having established a certain base of knowledge, the ICTY judges are now more interested in taking account of such information through either judicial notice (ICTY Rule 94) or agreement of the parties, in which case written testimony alone is introduced (ICTY Rule 94 *bis*).

*Authority to subpoena documents and witnesses.* Under Article 29 of the ICTY Statute, states are required to cooperate with ICTY investigations and prosecutions, including as regards the production of evidence. Under ICTY Rule 39, the prosecutor may summon and question witnesses and may seek the assistance of any state in doing so. Under Rule 54, a judge or trial chamber "may issue such orders, summonses, subpoenas, warrants, and transfer orders as may be necessary for purposes of an investigation or for the preparation or conduct of the trial."

One of the most controversial issues to arise for the Tribunal has been its authority to order states and officials of states to provide documentary evidence and testimony. The issue came to the fore in the *Blaškić* case<sup>45</sup> when the prosecutor *ex parte* obtained a *subpoena duces tecum* from ICTY Judge McDonald in January 1997 against the Republic of Croatia and its Defense Minister, Gojko Šušak, for the production of information. Croatia vehemently challenged the legal authority of the ICTY both to issue such an order and to fashion a remedy for violation of such an order. At the same time, subpoenas were issued at the request of the prosecutor to the Government of Bosnia-Herzegovina and its Minister of Defense, a Bosnian Croat. Blaškić's defense counsel, in turn, sought a *subpoena duces tecum* compelling Bosnia-Herzegovina's production of documents claimed to be exculpatory of Blaškić.

The matter was brought before Judge McDonald's trial chamber, which found that the ICTY judges have the authority to issue orders such as a subpoena to states, high government officials and individuals. National security claims may be raised to protect information, according to the chamber, but the validity of such claims is to be assessed by the judges. The chamber declined to rule on the remedies available to the ICTY in the event of noncompliance with such an order, essentially on the grounds that the issue was not yet ripe (*Blaškić*, July 18, 1997).

Similarly, the trial chamber in the *Celebići Camp* case issued subpoenas *ad testificandum* requiring five witnesses who were resident in Bosnia-Herzegovina and/or employed by its Government to appear on specified dates before the Tribunal (*Celebići Camp*, Oct. 15, 1997). The chamber also ordered the Custodian of Record of Bosnia-Herzegovina to testify about the authenticity of fourteen documents relevant to one of the accused.

<sup>44</sup> For a discussion of the ICTY Rules on evidence, see Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwandan Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81 (1997).

<sup>45</sup> See Yves Nouvel, *Précisions sur le pouvoir du Tribunal pour l'ex-Yugoslavie d'ordonner la production des preuves et la comparution des témoins: L'Arrêt de la Chambre d'appel du 29 octobre 1997 dans l'affaire Blaškić*, 102 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 157 (1998). In theory, the problem of the reluctant witness can arise in various contexts, including when journalists and representatives of nongovernmental organizations hesitate to testify out of concern that they might compromise their activities in the former Yugoslavia. See Françoise J. Hampson, *The International Criminal Tribunal for the Former Yugoslavia and the Reluctant Witness*, 47 INT'L & COMP. L.Q. 50 (1998).

On appeal of the *Blaškić* decision, the appeals chamber agreed that the ICTY may issue binding orders to states, since it must be able to take such steps to effectively investigate crimes, collect evidence, summon witnesses, and have indictees arrested and surrendered to The Hague (*Blaškić*, Oct. 29, 1997). Furthermore, the application of this authority is not limited to the states of the former Yugoslavia, although the appeals chamber noted that as a practical matter the authority is more likely to be needed with respect to those states. Orders seeking documents must (1) identify specific documents, not broad categories; (2) set out the reasons why the documents are relevant; (3) give the requested state sufficient time for compliance; and (4) not be unduly onerous. The chamber also found, however, that the ICTY cannot issue binding orders to specific officials of a state when acting in their official capacity, since it is for the state itself to determine which officials are responsible for the requested documents. The Tribunal can issue binding orders against individuals operating in a private capacity, for the same reason it can issue such orders to states. Curiously, the appeals chamber found that such individuals may be state officials, if the information sought is not obtained by them as a part of their official duties (e.g., a soldier who witnesses a war crime). Of course, whether national authorities will compel a reluctant witness to comply with the ICTY's order may depend on that state's municipal law. The United Kingdom has enacted legislation that provides for service of a summons issued by the ICTY to a witness located in the United Kingdom and, if the summons is not obeyed, for the arrest and delivery of the witness to The Hague.<sup>46</sup>

Unlike the trial chamber, the appeals chamber determined that it could address the remedies available in the event of noncompliance. The appeals chamber found that the ICTY has no enforcement powers vis-à-vis states; rather, its only recourse is to report such noncompliance to the Security Council. The Tribunal does have enforcement powers with respect to individuals acting in a private capacity, which include holding the person in contempt of court. The appeals chamber noted that, since the term "subpoena" carries with it the notion of a compulsory order, such an order can be directed only at individuals acting in their private capacity.

The appeals chamber also found that states could invoke a "national security" justification for withholding documents, but that it was for the ICTY judges to determine whether the justification was valid, which might be done by *in camera*, *ex parte* scrutiny. The appeals chamber set forth certain guidelines for such scrutiny but left the development of the exact procedures to the trial chambers. After the appeal, the *Blaškić* trial chamber issued binding orders directing Croatia (*Blaškić*, Jan. 30, 1998) and Bosnia (*Blaškić*, Apr. 29, 1998) to disclose specified documents to the prosecutor. Croatia successfully obtained a stay of the order against it from the appeals chamber (*Blaškić*, Feb. 26, 1998). The trial chamber then reconsidered its order and issued a new one (*Blaškić*, July 21, 1998). However, Croatia's prolonged refusal to produce documents has prevented the prosecution from using them during its presentation in the *Blaškić* case.

*Disclosure of information, including exculpatory information.* Under ICTY Rules 66-67, the prosecutor must disclose to the defense, in advance of trial, the material that was used to support the confirmation of the indictment, and copies of any statements made by the accused or by witnesses who will testify at trial. The defense, in turn, must notify the prosecutor if it intends to offer an alibi or other special defense, together with the information on which that defense is based. The defense can also ask to inspect all other materials the prosecutor intends to use at trial, in which case the prosecutor is entitled

<sup>46</sup> See Colin Warbrick, *Co-operation with the International Criminal Tribunal for Yugoslavia*, 45 INT'L & COMP. L.Q. 947 (1996).

to similar access to defense materials. Further, under ICTY Rule 68, the prosecutor "shall, as soon as practicable, disclose to the defense the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence."

For the most part, these rules on disclosure of information have worked well. Some issues have arisen, however, with respect to both disclosing information about witnesses (discussed below) and disclosing exculpatory information to the defense. With respect to the latter, counsel for Delić in the *Celebići Camp* case sought to force the prosecution to provide the defense with copies of "any" documents it held that would negate Delić's guilt; defense counsel also set forth certain broad categories of information that they believed would show the inapplicability of the 1949 Geneva Conventions. The trial chamber rejected Delić's motion, saying that such requests must be specific and cannot take the form of a blanket request for any evidence that would negate the accused's guilt (*Celebići Camp*, June 24, 1997). The chamber stated that the "Rules permitting disclosure of certain documents cannot be used freely as a means to obtain all information from the Prosecution and then subsequently to determine whether it can be used or not." Moreover, the chamber found that the categories of information sought in fact would not show the inapplicability of the 1949 Geneva Conventions and therefore would not be exculpatory.

In the *Furundžija* case, the defense successfully convinced the trial chamber to reopen the trial after its completion, on the grounds that the prosecution had not properly disclosed information to the defense about one of its witnesses (*Furundžija*, July 14, 1998). That information consisted of two documents relating to the witness's mental health, which, the defense argued, inter alia, showed that the witness was under psychiatric care for suppressed memory. The trial chamber found that "there has been serious misconduct on the part of the Prosecutor" since the "material clearly had the potential to affect the 'credibility of Prosecution evidence.'"<sup>47</sup>

Mention should also be made of three categories of information that are privileged from disclosure. First, communications between lawyer and client are privileged and not subject to disclosure unless the client consents or has voluntarily disclosed the information to a third party (ICTY Rule 97). Second, internal reports or memoranda prepared by a party in connection with the investigation or preparation of its case are not subject to disclosure (ICTY Rule 70(A)). Third, "lead information"—by which is meant information given for the purpose of generating new evidence—provided to the prosecutor by any person or entity (including a government) on a confidential basis is not subject to disclosure absent the consent of that person or entity (ICTY Rule 70(B)). With respect to this last category, if consent is obtained, the person or entity remains protected from being ordered to produce additional information. Various governments, including the United States, have provided such information to the prosecutor under the protection of ICTY Rule 70, and in some instances have authorized the disclosure of information to a trial chamber.<sup>48</sup>

*Protection of victims and witnesses.* Article 21 of the ICTY Statute provides that an accused is entitled to certain "minimum guarantees," including the right "to examine, or have examined, the witnesses against him." This right, however, is not absolute; rather, it is

<sup>47</sup> A resumed session was scheduled for November 1998 for the trial chamber to hear evidence and oral argument from both sides on the issue, before resuming its deliberations. The chamber ultimately found that the witness's testimony was credible. See *Furundžija* Judgment, para. 108 (Dec. 10, 1998).

<sup>48</sup> Those interested in the U.S. program for providing lead information to the ICTY prosecutor on a confidential basis will wish to review the reports to Congress by the Secretary of State, which are prepared every six months pursuant to U.S. foreign assistance legislation. See Foreign Operations Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. No. 105-118, §553, 111 Stat. 2386, 2422 (1997).

balanced against the need to protect victims and witnesses. Article 20(1) of the Statute expressly provides that the trials shall proceed both "with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

Due regard for the protection of witnesses may take various forms, including the assignment of pseudonyms, distortion of voice and video image, *in camera* testimony, and full anonymity, meaning that the witness's identity is not even revealed to the accused.<sup>49</sup> On several occasions, the trial chambers and the appeals chamber have considered challenges by the defense to such protection, which requires weighing the need for a fair and public trial with the need to ensure that witnesses can come forward without fear of violence to themselves or their families (many of whom continue to live in ethnically turbulent areas of Bosnia-Herzegovina) and under conditions that do not perpetuate their suffering. The latter issue becomes particularly acute when the witness has experienced severe trauma, such as being the victim of rape or sexual assault. Special protections for rape victims may be found in ICTY Rule 96, which excludes evidence of prior sexual conduct, prevents a defense based on consent if the victim's action was coerced, and provides that evidence corroborating a victim's testimony is not necessary for conviction.

In the *Tadić* trial, the prosecutor called seventy-six witnesses during its case in chief, of whom five were assigned pseudonyms. One witness was granted full anonymity, which the trial chamber permitted after assessing certain criteria: whether there was a real fear for the safety of the witness and his or her family, the importance of the witness's testimony, whether there was *prima facie* evidence that the witness was untrustworthy, whether other means of witness protection were available, and whether full anonymity was strictly necessary.<sup>50</sup> Even in this instance, however, the courtroom was arranged so that the defense counsel (but not the defendant) could view the witness.<sup>51</sup> Protection of witnesses, however, is not restricted to those testifying against the indictee. Of the forty witnesses called by the *Tadić* defense, nine testified under various sorts of protective measures. Further, several defense witnesses were granted "safe conduct" by the trial chamber, meaning that they would not be arrested while physically present in The Hague (*Tadić*, June 25, 1996). Protective measures were also granted to the defense for testimony relating to sentencing in the *Erdemović* case (*Erdemović*, Oct. 18, 1996; Nov. 13, 1996).

The trial chamber in the *Blaškić* case initially permitted the prosecutor to provide defense counsel only with redacted copies of the statements of all witnesses the prosecution intended to call at trial. However, as the trial date approached, the chamber ordered the prosecutor to give the defense unredacted copies, so that it would have a full opportunity to prepare its case. The prosecutor had claimed that continued nondisclosure was necessary to protect the witnesses, but the chamber did not believe that the

<sup>49</sup> See ICTY Rules 69 & 75. For more detailed discussion of ICTY witness protection issues, in particular full anonymity, see Natasha A. Affolder, *Tadić, the Anonymous Witness and the Sources of International Procedural Law*, 15 MICH. J. INT'L L. 445 (1998); Vincent M. Creta, Comment, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 HOUSTON J. INT'L L. 381 (1998); Y. M. O. Featherstone, *The International Criminal Tribunal for the Former Yugoslavia: Recent Developments in Witness Protection*, 10 LEIDEN J. INT'L L. 179 (1997); Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AJIL 75 (1997); Monroe Leigh, *Witness Anonymity Is Inconsistent with Due Process*, *id.* at 80; Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses against the Accused*, 90 AJIL 235 (1996); Alex C. Lakatos, Note, *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs against Defendants' Rights*, 46 HASTINGS L.J. 909, 923-37 (1995).

<sup>50</sup> The trial chamber's decision on whether to grant full anonymity appears in *Tadić* (Aug. 10, 1995), *reprinted* in 7 CRIM. L.F. 139 (1996), 105 ILR 599 (1997).

<sup>51</sup> See Featherstone, *supra* note 49, at 186.

exceptional circumstances argued by the prosecutor justified depriving the defense of such information. The chamber did order that the defense not disclose the information publicly (*Blaškić*, Sept. 18, 1996; Oct. 2, 1996) and accorded special protection to some of the witnesses (*Blaškić*, Nov. 5, 1996; May 6, 1998). When information about its witnesses subsequently leaked to the public, the prosecution unsuccessfully attempted to have the trial chamber penalize the defense. The chamber did take the step of ordering defense counsel not to disclose to the public or the media the names of witnesses residing in the former Yugoslavia, unless doing so was absolutely necessary for the preparation of their case. It further ordered both parties to maintain a log of every person to whom they had provided access to a witness statement. In December 1998, the chamber found a member of the defense counsel to be in contempt for having disclosed the identity of a protected person who had testified in a different trial, and imposed a fine of ten thousand guilders (approximately five thousand dollars) on the member (*Blaškić*, Dec. 11, 1998).

In the *Celebići Camp* case, the trial chamber granted a joint prosecution/defense motion prohibiting disclosure of the names of potential witnesses or other identifying data to the public or the media, except where disclosure to the public was necessary to investigate the witnesses adequately (*Celebići Camp*, Nov. 29, 1996). Shortly thereafter, a list of prosecution witnesses, including protected witnesses, was leaked to the publication *Sloboda Hercegovina*, which published it alongside an interview with one of the accused, Delalić. The President of the Tribunal, at the request of the trial chamber, investigated the matter and concluded that there was no evidence of misconduct by Delalić's counsel, but that the accused himself may have leaked the list. After further consideration, the chamber found that there was no evidence to refute Delalić's denial of the leak, and thus no basis for holding him in contempt.<sup>52</sup>

The trial chambers have chastised the prosecutor's office for its reluctance to provide information on witnesses to the defense. For instance, in the *Furundžija* case the failure of the prosecutor to hand over the statement of its main witness until just shortly before trial, despite having had the statement for months, was cited along with other actions as "conduct close to negligence." The trial chamber found that the conduct did not constitute contempt, since it fell short of knowing and willful interference with the administration of justice, but the chamber nevertheless issued a formal complaint to the prosecutor's office.<sup>53</sup>

*Video-link testimony.* In the *Tadić* case, the defense was authorized to present eleven witnesses (and did present eight witnesses) during October 1996 via satellite video-link from Banja Luka in Bosnia pursuant to guidelines set by the trial chamber (*Tadić*, June 25, 1996; Oct. 11, 1996; Oct. 16, 1996; Oct. 17, 1996). The chamber stated that permission for such testimony turned on two criteria: (1) the testimony must be sufficiently important to make it unfair to proceed without it; and (2) the witness must be unable or unwilling to come to The Hague. The defense established by affidavit that the witnesses were unwilling to come to The Hague for fear that they themselves would be arrested. The trial judges, prosecution and defense lawyers, and interpreters in the ICTY courtroom in The Hague put their questions by video-link to the witnesses in Banja Luka (each witness was in the presence of the deputy registrar and members of the prosecution and

<sup>52</sup> *Celebići case: Prosecution Case to Continue Friday after Decision on Contempt Issue*, ICTY Doc. CC/PIU/204-E (May 29, 1997).

<sup>53</sup> Under the ICTY Statute and Rules, ICTY judges have no express disciplinary powers over the Office of the Prosecutor. Indeed, a trial chamber has found that it has no jurisdiction to consider the matter of a code of conduct for the prosecution (*Kovačević*, May 12, 1998). By contrast, defense counsel appearing before ICTY trial chambers are bound by the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal, ICTY Doc. IT/125 (June 12, 1997), *reprinted in* 37 ILM 488 (1998).

defense teams). Permission was also granted to the prosecutor for video-link testimony in the *Celebići Camp* (*Celebići Camp*, May 28, 1997) and *Dokmanović* cases (*Dokmanović*, Mar. 11, 1998; May 22, 1998), but the three witnesses in *Celebići Camp* ultimately declined to testify. Further along in that trial, the trial chamber denied a prosecution request for video-link testimony on the grounds that there were no exceptional circumstances justifying such testimony (*Celebići Camp*, Nov. 11, 1997).

*Perjury.* Every witness who testifies before a trial chamber must undertake to "speak the truth, the whole truth, and nothing but the truth" (ICTY Rule 90(B)). Ever since trials commenced at the ICTY, there has been concern about the accuracy of witness testimony, in part attributable to the circumstances under which acts were witnessed (often by persons in deep distress or shock), and in part due to ethnic enmities that may promote false testimony. If a trial chamber believes that false testimony has been given, under ICTY Rule 91 the prosecutor may indict and prosecute the witness concerned; if convicted, the witness may be fined and/or imprisoned for twelve months.

During the *Tadić* case, the defense successfully found discrepancies in the August 1996 testimony of one of the prosecution's witnesses, Dragan Opacić. Confronted with the discrepancies, Opacić admitted that he had lied under oath in testifying that he had seen Tadić commit acts charged against him. After investigating further, the prosecutor withdrew Opacić's testimony but recommended that he not be prosecuted for false testimony. On May 27, 1997, the trial chamber ordered that Opacić be returned to the custody of the Bosnian Government, since he was serving a prison sentence of ten years in Bosnia-Herzegovina. Opacić unsuccessfully appealed the decision to return him to Bosnia-Herzegovina.<sup>54</sup>

### *Challenge of Judges*

On occasion, counsel have sought to disqualify one or more of the ICTY judges on grounds that they could not decide a matter impartially or that to allow them to decide a matter would otherwise prejudice the defendant. When such challenges occur, the matter is referred to the ICTY "Bureau" of judges, which consists of the President, Vice President, and presiding judges of the trial chambers (ICTY Rule 23).

Judge McDonald issued a subpoena on her own authority against the Government of Croatia in the *Blaškić* case (discussed above). When Croatia challenged the validity of the order, Judge McDonald referred the matter to her full trial chamber, consisting of herself, as presiding judge, and two other judges. Croatia then asked Judge McDonald to recuse herself from participating in the chamber's hearing on the grounds that it was her order that was under consideration. The ICTY Bureau met to consider the matter. Since she was a member of the bureau in her role as presiding judge of a trial chamber, Judge McDonald voiced her views and then withdrew from the discussion. The bureau concluded that the impartiality of Judge McDonald was in no way affected by her earlier participation in issuing the subpoena and therefore that she could participate in the hearing (*Blaškić*, Oct. 29, 1997, para. 11).

On February 20, 1998, the defense in the *Kordić* case filed a motion seeking to disqualify Judges Jorda and Riad from sitting on the trial chamber, on the grounds that (1) their service on the *Blaškić* trial would unduly delay the commencement of the *Kordić* case, and (2) hearing the closely related testimony and evidence in the *Blaškić* case would

<sup>54</sup> *In the Case of Dragan Opacić*, Decision on Application for Leave to Appeal, Case No. IT-97-7-Misc.1 (June 3, 1997).

prejudice their ability to hear witnesses and evidence in the *Kordić* case. The bureau decided that sitting on the *Blaškić* trial would not affect the impartiality of Judges Jorda and Riad in *Kordić*, stating that,

as is shown by the jurisprudence on the subject, it does not follow that a judge is disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases. . . . A judge is presumed to be impartial. (*Kordić*, May 4, 1998)

In addition, the bureau noted that the unique jurisdiction of the ICTY made it inevitable that there would be some overlap of issues and evidence in the cases brought before it.

The bureau referred back to the trial chamber the issue of whether the involvement of these two judges in the *Blaškić* trial would unduly delay the start of the *Kordić* trial. The trial chamber found that, under the ICTY Rules, delay in proceedings is not a ground for disqualifying a judge, and that, in any event, the *Kordić* case was not being unduly delayed (*Kordić*, May 21, 1998). The chamber pointed out that the practical difficulties faced by the ICTY (a large number of trials and a limited number of courtrooms, judges and staff) would not be remedied by disqualifying certain judges.

On May 24, 1998, the defense in the *Celebići Camp* case filed a motion requesting that Judge Odio Benito—who had been elected Vice President of Costa Rica and was sworn in on May 8, 1998—withdraw from the case. The defense argued that, as a high-ranking political official, Judge Odio Benito no longer possessed the qualifications for holding judicial office in her country and, further, that she might have to exercise political functions regarding the UN Security Council (of which Costa Rica was currently a member). The bureau denied the motion on September 4, 1998.

### *Elements of Crimes*

The ICTY Statute and relevant treaties on international humanitarian law set forth what acts constitute war crimes, but they do not describe in any detail the various elements that should be found in order to determine whether the crime was committed. Thus, one of the most important aspects of the ICTY's jurisprudence is its elaboration of the elements of war crimes, and its application of the facts of specific cases to those elements. To date, the Tribunal has addressed the following crimes when convicting or acquitting indictees: willful killing or murder, cruel or inhumane treatment, unlawful confinement, persecution, plunder, torture, and willfully causing great suffering or serious injury to body or health.

Analyzing the elements of each of these crimes and the facts applied to them in particular cases is beyond the scope of this discussion. By way of example, however, in *Furundžija* a trial chamber needed to decide whether particular acts committed at a house and hostel in Nadioci, Bosnia, against a Bosnian Muslim woman (as well as a man who had allegedly betrayed the Bosnian Croats) constituted "torture." Those acts consisted of threats and physical attacks (including rape, discussed below) inflicted during interrogation by members of a paramilitary group. In considering whether this constituted the war crime of "torture," the trial chamber conducted an extensive review of international humanitarian law and international human rights law, and then determined that the war crime of torture:

- (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
- (ii) this act or omission must be intentional;
- (iii) it must aim at obtaining information or a confession, or at punishing,

intimidating, humiliating, coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;

(iv) it must be linked to an armed conflict;

(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.*, as a *de facto* organ of a State or any other authority-wielding entity. (*Furundžija*, Dec. 10, 1998, para. 162)

In addition to setting forth the elements of the crime of torture, the trial chamber found that the prohibition of torture imposes obligations *erga omnes* upon states and has acquired the status of *jus cogens* (a peremptory norm of international law) (*id.*, paras. 151, 153).

### *Rape and Sexual Assault*

Rape was widely used during the conflict in the former Yugoslavia as a means of "ethnic cleansing."<sup>55</sup> For that reason, the ICTY Statute specifically lists rape as a crime against humanity when committed in armed conflict and directed against a civilian population.<sup>56</sup> It is difficult, however, to prove that one such assault is part of an orchestrated plan to carry out mass rapes, which has left the prosecutor typically charging rape as either a grave breach or a violation of the laws and customs of war. The ICTY Statute does not expressly mention rape as a grave breach or other war crime; nor do the 1949 Geneva Conventions list rape as a "grave breach." Nevertheless, the definition of "grave breach" (which includes torture, inhumane treatment, and the infliction of great suffering or serious injury to body or health) clearly encompasses rape. As discussed above, special evidentiary rules have been developed to address cases involving sexual assault.<sup>57</sup>

In the Rule 61 hearing against Nikolić, the prosecution presented evidence that women (including young girls) were subjected to rape and other forms of sexual assault during their time at Sušica camp, and that the accused was implicated in some of these assaults. The prosecutor, however, had not charged Nikolić with sexual assault, as either a crime against humanity, a grave breach, or a violation of the laws or customs of war. Consequently, the trial chamber invited the prosecutor to amend the indictment to include such counts.

At his trial, Tadić faced charges of direct responsibility for having participated in gang rapes at Trnopolje camp and having forced two male prisoners at Omarska camp to commit sexual acts on another prisoner and to mutilate him. The prosecutor found it difficult to prove these charges, however, largely because of the reluctance of witnesses to testify and the ultimate unreliability of the testimony of Opacić (discussed above). Consequently, the trial chamber concluded that, while Tadić was involved in the transfer

<sup>55</sup> See, *e.g.*, Colloquy, *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 89 (1994) (report by the Women in the Law Project of the International Human Rights Law Group). For more information on sexual assault issues before the ICTY and as may arise before the ICC, see Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45 (1997).

<sup>56</sup> This topic is examined in depth in another contribution to this issue, but aspects are summarized here. See D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 17 J. L. & P. 97.

<sup>57</sup> Charges of sexual assault will be tried in the *Omarska Camp* case and the case against Dragoljub Kunarac. In *Omarska Camp*, a deputy commander of the camp, Miroslav Kvočka, and shift commanders Mladen Radić and Miroslav Kos are charged with command responsibility for sexual assaults committed by subordinates at the camp during May–August 1992. Separately, Kunarac was named as one of the defendants in the first indictment dealing exclusively with sexual offenses. According to the indictment, Kunarac was the commander of a special unit that was directly involved in the gang rape, torture and enslavement of Muslim women in Foča from April 1992 to February 1993. He is charged with 9 counts of crimes against humanity and 12 counts of violations of the laws or customs of war (a grave breach count was dropped by the prosecutor when the indictment was amended in August 1998).



of non-Serbs to Trnopolje camp, he was not actively involved in their continued confinement, including any gang rapes (*Tadić*, May 7, 1997, para. 455). Moreover, the chamber found that Tadić was present during the sexual assault and mutilation at Omarska camp, but did not take an active part in it (*Tadić*, May 7, 1997, para. 237).

In the *Celebići Camp* case, Hazim Delić was convicted of a grave breach of the Geneva Conventions for having raped two defenseless women on several occasions (*Celebići Camp*, Nov. 16, 1998). In that case, the trial chamber determined that, under ICTY Rule 96, the defense is strictly forbidden to introduce evidence of a rape victim's prior sexual conduct (*Celebići Camp*, June 5, 1997). Such evidence includes whether the witness has had an abortion.

In the *Furundžija* case, the defense argued in a pretrial motion that torture and outrages upon personal dignity, including rape, are not "violations of the laws and customs of war" but, rather, can be prosecuted only as "grave breaches." The trial chamber rejected that argument, finding that acts such as rape could qualify under either its Article 2 jurisdiction (grave breaches) or its Article 3 jurisdiction (laws and customs of war), depending on the circumstances. In its final judgment, the trial chamber surveyed international law and domestic law for purposes of defining "rape," which it characterized as follows:

- (i) the sexual penetration, however slight:
    - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or
    - (b) of the mouth of the victim by the penis of the perpetrator;
  - (ii) by coercion or force or threat of force against the victim or third person.
- (*Furundžija*, Dec. 10, 1998, para. 185)

### *Reprisal as a Defense*

Even if one commits a violation of international humanitarian law, in some circumstances a defense of "reprisal" will be allowed, if the violation was a proportionate response to a violation committed by the opposing side. However, in treaties applicable to international conflicts, certain acts of reprisal are forbidden, such as reprisals directed against civilians and civilian objects. In the *Martić* Rule 61 decision, at which defense counsel were not present, the trial chamber ruled that reprisals against civilians are prohibited in all conflicts, international or internal (*Martić Rule 61 Decision*, *supra* note 3).

### *Conviction after Trial*

The first indictee to be convicted after trial was Tadić (*Tadić*, May 7, 1997). He was convicted in May 1997 of a crime against humanity for having engaged in persecution during the attack by Bosnian Serb forces on the Bosnian village of Kozarac and the forcible expulsion from Opština Prijedor of non-Serb civilians. Among the acts underlying this charge were the killing of two persons in Kozarac and beatings of prisoners at Omarska and Keraterm camps. Tadić was also convicted of ten other counts of violations of the laws or customs of war and crimes against humanity in connection with his involvement in five specific incidents, including beatings and abuse of detainees at the Omarska camp and of civilians taken from their homes in Kozarac. At the same time, the trial chamber acquitted Tadić of twenty counts, including those charging grave breaches (discussed above).

In the *Celebići Camp* case, the trial chamber in November 1998 convicted three indictees after trial: Mucić, Delić and Landžo. They were found guilty of grave breaches of the Geneva Conventions and violations of the laws and customs of war committed at

the Celebići camp in the Konjić municipality of central Bosnia during 1992. The charges concerned the killing, torture, sexual assault and beating of Bosnian Serbs held at the camp, as well as other cruel and inhumane treatment stemming from conditions in the camp. While each of the indictees was acquitted of some of the charges, all were convicted of at least eleven counts.

In *Furundžija* the trial chamber convicted Furundžija of torture and outrages upon personal dignity, including rape, both constituting violations of the laws or customs of war, for acts against two individuals by Bosnian Croat paramilitary forces (known as the "čokers") at a house and hostel in Nadioci, Bosnia (*Furundžija*, Dec. 10, 1998).

### *Validity of Plea*

The ICTY Statute and Rules do not regulate negotiations between the prosecutor and an indictee regarding a plea of guilty; nor do they provide the prosecutor with any power to grant immunity. Consequently, when the prosecution engages in discussions with lawyers representing indictees at large who may wish to surrender, it can only promise to make representations to the ICTY judges on matters falling within their powers, such as scheduling the trial, withdrawing some charges in exchange for a guilty plea on the others, and shortening the sentence if a guilty plea is entered.

The appeals chamber has declared a guilty plea to be invalid when the indictee was not properly informed of the charges against him (*Erdemović*, Oct. 7, 1997).<sup>58</sup> Charges were initially brought against Erdemović both for a crime against humanity and for a violation of the laws and customs of war. Erdemović pleaded guilty to the crime against humanity. The trial chamber permitted the prosecutor to drop the second charge and sentenced Erdemović to ten years' imprisonment for his crime against humanity (*Erdemović*, Nov. 25, 1996).<sup>59</sup> The appeals chamber, however, found that, when making his plea, Erdemović did not understand the nature of the charges against him and the consequences of electing to plead guilty to a crime against humanity instead of a war crime (*Erdemović*, Oct. 7, 1997). Judges McDonald and Vohrah, in their joint separate opinion, wrote that, for a plea to be valid, it must be voluntary, unequivocal and informed, and that in this instance the last element was lacking. In light of this ruling, Erdemović was given the opportunity to replead to the lesser offense, which he did. However, when the ICTY in July 1998 formalized its approach to guilty pleas by the addition of a new rule (ICTY Rule 62 *bis*), the judges provided only that the plea be voluntary and unequivocal, and that there be a sufficient factual basis for the crime and the accused's participation in it. The new rule did not require the trial chamber to satisfy itself that the indictee was "fully informed" of the nature of the charges to which he has pleaded.

In March 1998, Dragoljub Kunarac sought to plead guilty to certain charges of rape. In doing so, however, he argued that his conduct did not amount to a "crime against humanity" but, rather, to some lesser charge. The prosecutor was unwilling to concur in such a plea and, consequently, the trial chamber ordered that the trial proceed with a plea of not guilty to all charges.

### *Sentencing*

Article 24 of the ICTY Statute limits penalties to imprisonment, precluding the imposition of the death penalty. In determining the term of imprisonment, the trial

<sup>58</sup> See Olivia Swaak-Goldman, Case note, 92 AJIL 282 (1998); David Turns, *The International Criminal Tribunal for the Former Yugoslavia: The Erdemović Case*, 47 INT'L & COMP. L.Q. 461 (1998); Sienho Yee, *The Erdemović Sentencing Judgement: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 GA. J. INT'L & COMP. L. 263 (1997).

<sup>59</sup> The trial chamber's decision is reprinted in 108 ILR 180 (1998).

chamber must have "recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia." To that end, the prosecution and defense counsel have provided the Tribunal with information on the schedule of penalties and the sentencing policy in Yugoslavia.<sup>60</sup> Since the criminal laws of the former Yugoslavia, however, do not include some of the key crimes addressed by the ICTY, such as crimes against humanity, one trial chamber has indicated that "the International Tribunal will review the relevant legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction" (*Erdemović*, Nov. 29, 1996, para. 40). Article 24 and ICTY Rule 101 also call upon trial chambers to take into account the gravity of the offense, the individual circumstances of the convicted person, and any aggravating or mitigating circumstances.

As of December 1998, the ICTY had sentenced six indictees. For the crime against humanity—a charge based on various acts of persecution, including the killing of two men—the trial chamber sentenced Tadić to a term of twenty years' imprisonment (*Tadić*, July 14, 1997). For each of five incidents involving beatings of Muslim civilians, Tadić was convicted of both crimes against humanity and violations of the laws or customs of war. For two of these incidents, he was sentenced to ten years for the crime against humanity and nine years for the violation of the laws or customs of war. For the remaining three incidents, he was sentenced to seven years for the crime against humanity and six years for the violation of the laws or customs of war. The chamber ruled that these sentences were to be served concurrently, effectively making the penalty a twenty-year sentence. The chamber also recommended that the sentence not be commuted to a term of less than ten years.

The second sentencing was of Erdemović, who pleaded guilty to a violation of the laws or customs of war in connection with his participation in the execution of numerous unarmed Muslim civilians after the fall of Srebrenica in 1995 (*Erdemović*, Mar. 5, 1998). Erdemović was sentenced to five years' imprisonment. In issuing the sentence, the trial chamber took into account both aggravating and mitigating factors. With respect to aggravation, the chamber noted the magnitude of Erdemović's crime, namely, the killing of numerous civilians. In mitigation, the chamber cited various factors: that Erdemović was young at the time of the crime (twenty-three years old); that he was remorseful and capable of being reformed; that he had a wife and child; and that he had freely confessed his guilt and cooperated fully with the prosecutor in his own and other cases. Further, the chamber took into account that Erdemović had committed the crime under duress, finding that there was a "real risk that the accused would have been killed had he disobeyed the order" to kill the victims.

In setting the length of the sentence, the trial chamber surprisingly did not adopt a joint recommendation by the prosecutor and the defense of seven years' imprisonment but, instead, imposed a term of five years. Since the chamber gave him credit for time served, he will be imprisoned for just slightly more than three years from the date of his sentencing for the self-confessed killing of some seventy people. By contrast, when Erdemović initially pleaded guilty to a crime against humanity (a plea subsequently found invalid, as discussed above), he was sentenced by the trial chamber to ten years'

<sup>60</sup> See, e.g., Prosecutor's Brief on Aggravating and Mitigating Factors, *Erdemović* (Nov. 11, 1996). For some of the difficulties in trying to take account of "general practice" in the former Yugoslavia, as well as a general discussion of sentencing by the ICTY and the ICTR, see William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461 (1997).

imprisonment (*Erdemović*, Nov. 29, 1996). In that decision, the chamber placed special emphasis on the desire to stigmatize crimes against humanity when taking mitigating factors into account.

Tadić's sentence was issued as part of a proceeding conducted separately from his trial, just as Erdemović's sentence was issued pursuant to a proceeding separate from the one that accepted his guilty plea. In both cases, the relevant trial chamber conducted a proceeding at which evidence was presented specifically relating to sentencing. Such an approach has its benefits. As a general matter, an indictee who has pleaded not guilty may not wish to present evidence relevant to sentencing prior to a conviction, so as not to prejudice the outcome on the merits, and also may wish during the trial to challenge prosecution evidence relevant to sentencing but not to a conviction. In July 1998, however, the ICTY amended its Rules to provide that evidence at trial should include information that may assist the trial chamber in determining an appropriate sentence (ICTY Rule 85) and that the trial chamber, if it finds the indictee guilty, will at the same time determine the penalty (ICTY Rule 87). Consequently, unless otherwise directed by the chamber, both sides must introduce in the course of the trial any evidence they wish to rely on with respect to sentencing.

Operating under this new rule, the trial chamber determined the guilt and the sentence at the same time of the four indictees in the *Celebići Camp* case. The chamber acquitted Delalić, finding that his relationship to the camp was insufficient to sustain the charges. However, the chamber convicted the other three indictees. For eleven counts of grave breaches of the Geneva Conventions and violation of the laws and customs of war, some of which were based on his superior responsibility as commander of the camp, Mucić was sentenced to seven years' imprisonment. The chamber took into account as a mitigating factor the fact that Mucić himself had not directly participated in any murder or torture. For thirteen counts of grave breaches of the Geneva Conventions and violation of the laws and customs of war, including murder, torture and rape, Delić was sentenced to twenty years' imprisonment. For seventeen counts of grave breaches of the Geneva Conventions and violation of the laws and customs of war, Landžo was sentenced to fifteen years' imprisonment. The chamber took into account as a mitigating factor Landžo's youth at the relevant time, his impressionability and his immaturity, as well as the effect on him of the waging of the armed conflict in his hometown (*Celebići Camp*, Nov. 16, 1998).

In *Furundžija* the trial chamber sentenced Furundžija to ten years' imprisonment for committing torture and eight years' imprisonment for committing outrages upon personal dignity, including rape. The sentences run concurrently. In issuing these sentences, the chamber stated that the viciousness of the crimes, the status of the female victim as a civilian detainee, and the defendant's position as commander of the Jokers were aggravating factors (*Furundžija*, Dec. 10, 1998, para. 283). The chamber took into account that Furundžija himself had not perpetrated acts of rape, but, given the gravity of the offenses, it refused to accept as mitigating factors his age (twenty-three years at the time of the offenses), his lack of a prior record, and his status as father of a young child (*id.*, paras. 282, 284).

*Duress as mitigation of guilt/sentence.* In the *Erdemović* case, the trial chamber initially found, on the basis of the jurisprudence of the Nuremberg and Tokyo Tribunals, that duress may "be regarded as a defence for the criminal conduct which might go so far as to eliminate the mens rea of the offence and therefore the offence itself" (*Erdemović*, Nov. 29, 1996). Erdemović admitted to having participated in a mass killing carried out by his Bosnian Serb Army unit at a collective farm north of

Srebrenica, during which hundreds of Muslim men, aged seventeen to sixty, were summarily executed over a period of five hours. However, Erdemović is an ethnic Croat, and he claimed to have been ordered to commit the killings under the threat of being shot himself if he disobeyed. At the same time, the trial chamber found that "proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided" (*id.*).

The appeals chamber, however, subsequently ruled (by a split vote of 3-2) that duress could not constitute a complete defense to a charge either of violation of the laws or customs of war or of a crime against humanity, but could be considered as a mitigating circumstance (*Erdemović*, Oct. 7, 1997). The majority found no rule of customary international law or general principle of law addressing this issue definitively. Instead, the conclusion was based on policy grounds—that to allow a defense of duress would undermine the aims and objectives of international humanitarian law.

*Obedying orders as mitigation of sentence.* Article 7(4) of the ICTY Statute provides that "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires." The trial chamber in the *Erdemović* case noted that the Nuremberg Tribunal did not reduce sentences on this basis for high-level officials, but that other tribunals have done so, especially when the accused held a low rank (*Erdemović*, Nov. 29, 1996). Consequently, the chamber took into account in sentencing him that Erdemović was a low-ranking soldier following the orders of his superiors.

One might question the propriety of drafting Article 7(4) so as completely to preclude the ability of low-ranking soldiers to plead a defense of superior orders.<sup>61</sup> Even though the Nuremberg Charter precluded this defense for high-ranking officials, subsequent Nuremberg proceedings against lower ranking officials permitted it where the defendant showed that the order was not, on its face, unlawful. In that spirit, the 1998 statute of the international criminal court was drafted so as to allow such a defense.<sup>62</sup>

*Enforcing/commuting the sentence.* ICTY Rule 103 provides that "[i]mprisonment shall be served in a State designated by the President of the Tribunal from a list of States which have indicated their willingness to accept convicted persons." The ICTY has concluded agreements with Finland (May 7, 1997), Italy (Feb. 6, 1997) and Norway (Apr. 24, 1998) for the enforcement of sentences. Until the appeal by Tadić of his conviction and sentencing is resolved, as well as any appeals by Delić, Landžo, Mucić and Furundžija, questions about the location for serving their sentences cannot be settled. Since August 1998, Erdemović has been serving his sentence in Norway.

The ICTY Statute and Rules do not specifically address reduction or commutation of sentences. Rule 104 states only that sentences of imprisonment shall be supervised by the ICTY or a body designated by it. The agreements between the ICTY and Finland, Italy and Norway provide that, if the convicted person is eligible for a pardon, a commutation of sentence or work activities outside a prison, the enforcing state is to notify the Tribunal, which must determine whether such measures are appropriate (ICTY Rules, Part Nine). If the ICTY does not consider them appropriate, it may require the convict

<sup>61</sup> See ABA SPECIAL TASK FORCE, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 37-40 (Monroe Leigh & Elizabeth Echols eds., 1993).

<sup>62</sup> Article 33 of the ICC statute, *supra* note 15, permits a defense based on the orders of a superior where (1) the person was under a legal obligation to obey orders of the government or the superior in question; (2) the person did not know that the order was unlawful; and (3) the order was not manifestly unlawful. However, Article 33 provides that any order to commit genocide or crimes against humanity is manifestly unlawful.

to be returned to the Tribunal. Since its existence is meant to be limited, however, it is not clear what role, if any, the ICTY will play if issues of commutation arise after its demise.

### Appeals

*Interlocutory appeal.* ICTY Rule 72(B) allows interlocutory appeal of preliminary motions (i.e., motions relating to jurisdiction, defects in the form of the indictment, exclusion of evidence, severance of crimes joined in one indictment, separate trials or denial of a request for assignment of counsel) only when the motion appealed concerns jurisdiction (e.g., *Tadić*, Oct. 2, 1995), or when leave to appeal, upon a showing of "good cause," is granted by three judges of the appeals chamber.

Prior to November 12, 1997, however, the standard under ICTY Rule 72(B) was "serious cause" rather than "good cause." In determining whether there was "serious cause," the appeals chamber asked whether the motion showed

a grave error which would cause substantial prejudice to the accused or is detrimental to the interests of justice, or raise[s] issues which are not only of general importance but are also directly material to the future development of trial proceedings, in that the decision by the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber. (*Blaškić*, Oct. 14, 1996)

Efforts to show "serious cause" were unsuccessful in the *Blaškić*, *Celebići Camp*, and *Dokmanović* cases, although the chamber nevertheless considered whether to grant leave for Dokmanović's appeal of the legality of his arrest "in view of the fundamental nature of the issues" (*Dokmanović*, Nov. 11, 1997). Whether the lower standard of "good cause" will now allow for more interlocutory appeals is unclear, but the ICTY judges appear to have lowered the standard so as to permit greater resort to interlocutory appeals of preliminary motions. At the same time, the appeals chamber has precluded certain efforts to appeal decisions outside the scope of "preliminary motions," such as motions seeking provisional release (*Celebići Camp*, Nov. 22, 1996) and protection of witnesses (*Blaškić*, Oct. 14, 1996).

Separately, the denial of a motion for relief under ICTY Rule 73 (which covers other motions for "appropriate ruling or relief generally") may be the subject of an interlocutory appeal if the denial would irreparably prejudice the case or the issue is of general importance to the proceedings or to international law generally. Delalić sought such an appeal when the trial chamber required the defense to disclose the identity of its witnesses seven days prior to their testimony. The appeals chamber refused to allow the interlocutory appeal, finding that the trial chamber's decision would not cause such prejudice to the defense as could not be cured by the final disposition of the trial, including postjudgment appeal (*Celebići Camp*, Mar. 4, 1998).

New ICTY Rule 108 *bis* was added to allow for certain nonparties, namely states, that are "directly affected" by a trial chamber's decision to seek interlocutory review by the appeals chamber so long as the decision concerns "issues of general importance relating to the powers of the Tribunal." This step was successfully taken by Croatia during the proceedings on the *Blaškić* case subpoenas (*Blaškić*, July 29, 1997), discussed above.

*De novo review.* The appeals chamber has not allowed defendants to raise issues before it that were not raised before the trial chamber. For example, in the *Celebići Camp* case, the appeals chamber refused to allow the defendant Delić to challenge the jurisdiction of the ICTY since no such challenge had been raised below (*Celebići Camp*, Dec. 6, 1996). The pending appeal by Tadić of his conviction/sentencing includes an effort to introduce evidence for the first time at the appeals stage.

*Appeal of conviction/sentence.* The conviction and sentencing of an indictee may be appealed under Part Seven of the ICTY Rules. Tadić has challenged his conviction and sentence on various grounds, including that his right to a fair trial was limited (such as by a limited ability to examine witnesses), that the charges against him were not specific enough, that the acts were made criminal *ex post facto*, and that evidence was erroneously admitted. As of December 1998, the appeals chamber had not yet disposed of the appeal. Similarly, Erdemović appealed his initial sentence, which ultimately led to the rejection of his guilty plea. An interesting aspect of the *Erdemović* appeal was the appeals chamber's finding that it could raise *proprio motu* certain issues not raised by Erdemović, which included whether his plea was valid (*Erdemović*, Oct. 7, 1997).

### III. ICTY'S LEGACY

The ICTY has both supporters and critics. Critics tend to focus on the fact that the most notorious indictees, Mladić and Karadžić, remain unpunished, while certain other notorious persons, such as the leader of the FRY, Slobodan Milošević, have not even been indicted. Moreover, to the extent that the ICTY's main function is viewed as deterring war crimes, critics note that its establishment in 1993 did not prevent the commission of atrocities in the former Yugoslavia, such as were seen after the fall of Srebrenica in the summer of 1995, or seen in Kosovo in 1998, despite well-publicized efforts by the Tribunal to investigate these acts.<sup>63</sup> Its harshest critics charge that the establishment of the ICTY was simply a cost-free effort by some governments to assuage their guilt about not intervening meaningfully in the former Yugoslavia prior to 1995. At a more abstract level, the ICTY is characterized as a farcical effort by internationalists to graft some degree of Austrian coercion onto international law.<sup>64</sup>

Yet, regardless of the reasons for its establishment and even of its eventual success in prosecuting the highest leaders of the former Yugoslavia, the ICTY is developing an unprecedented jurisprudence of international humanitarian law. Prior to its creation, the principal sources of international judicial precedent remained the fifty-year-old decisions of the Nuremberg and Tokyo Tribunals. Now there is a further substantial and growing corpus of international judicial decisions that will ultimately affect international humanitarian law in a variety of areas, comprising (to name just a few) the sources of such law in treaty or custom; the content of such law, including the means by which hostilities may be conducted against civilians in internal conflicts; the central requirements for proving notorious crimes, such as "torture" and "crimes against humanity"; the attribution of crimes to superiors pursuant to theories of "command responsibility"; the permissibility of defenses to such crimes, such as those based on reprisal or duress; the manner in which suspects may be apprehended, imprisoned, tried, and punished; the rights of suspects to counsel, cross-examination of witnesses, and exculpatory evidence; and the treatment of victims and witnesses. The decisions will affect the future work of the ICTY, the ICTR,<sup>65</sup> the permanent international criminal court, and national courts and tribunals<sup>66</sup> when deciding cases in this area. Moreover, in reaching its conclusions, the ICTY often interprets cus-

<sup>63</sup> See Marlise Simons, *U.N. War Crimes Tribunal Steps up Its Inquiry Into Kosovo*, N.Y. TIMES, Aug. 26, 1998, at A4; Philip Shenon, *Kosovo's Crisis Is Bad, and Getting Worse*, N.Y. TIMES, Sept. 16, 1998, at A8.

<sup>64</sup> See, e.g., Lucas W. Andrews, Comment, *Sailing Around the Flat Earth: The International Criminal Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*, 11 EMORY INT'L L. REV. 471 (1997).

<sup>65</sup> The ICTR's principal decision assessing its own jurisdiction paid close attention to the ICTY appeals chamber's decision on jurisdiction in the *Tadić* case. Prosecutor v. Kanyabashi, Decision on Jurisdiction, Case No. ICTR-96-15-T (June 18, 1997), summarized in Virginia Morris, Case note, 92 AJIL 66 (1998).

<sup>66</sup> See, e.g., Public Prosecutor v. Djajić, *supra* note 25 (when convicting Bosnian Serb of war crimes in Bosnia, German court referred to ICTY proceedings).

toary rules of international law and surveys criminal laws of a variety of countries to determine whether a general principle of law exists. Such assessments will likely have a ripple effect on the development of both international law and national law outside the context of international humanitarian law. For instance, the ICTY regularly refers to and interprets certain human rights instruments, such as the International Covenant on Civil and Political Rights<sup>67</sup> and the European Convention on Human Rights.<sup>68</sup> As a result, future interpretations of those instruments will need to take account of the ICTY's rulings. The presence of the ICTY is even beginning to make its way into pleadings before and decisions of the International Court of Justice.<sup>69</sup>

An important element in the further development of the ICTY's jurisprudence will be the continued detention of indictees. Without such detentions (by national authorities, SFOR, or otherwise), the ICTY's jurisprudence will be limited in scope. Moreover, the more indictees that are taken into custody, the greater the likelihood that they will provide information to the prosecutor that will assist in indicting high-level perpetrators of war crimes in the former Yugoslavia. Of course, at some point, the international community will pull back from extensive engagement in Bosnia-Herzegovina, which may decrease the ability to bring indictees forcibly into custody.

For the time being, the ICTY will focus on its two principal missions: investigating war crimes and prosecuting those believed to be the most culpable in committing them. Its investigations will focus on leadership elements and will not pursue mid- or low-level alleged criminals. In prosecuting indictees, the ICTY will emphasize moving trials along expeditiously, to avoid charges that by delaying justice, justice is denied. Significantly increased staff, judges and courtroom facilities, which allows three trials to be heard full-time simultaneously, will enable the Tribunal to proceed more quickly than was previously possible. Further, the ICTY staff and judges are building up a reservoir of knowledge and experience in conducting war crimes trials that will result in more streamlined prosecutions.

Even if no further indictees are brought into custody, it will probably take the ICTY at least another three years to conclude the trials (including any appeals) currently before it. If more indictees are brought into custody, that horizon will extend even further. Since the ICTY is a Security Council institution with a narrow geographical mandate, it will not mutate into the treaty-based permanent international criminal court. On the other hand, if a permanent court is established in The Hague (as seems likely), it will inherit much of the ICTY's resources and facilities, particularly as the Tribunal winds down its work. This would benefit the permanent court by permitting it to avoid the laborious start-up process previously faced by the ICTY and the ICTR.

The ICTY is far from perfect; it carries a bureaucracy endemic to most large institutions. Yet many of the problems faced by the ICTY are a product of the difficult conditions in which it operates, as it must rely almost exclusively on cooperation by states to obtain information, financial support and custody of indictees. The real success of the ICTY lies in the fact that, despite these obstacles, it is a functioning international criminal court that is providing a forum for victims to accuse those who violated civilized norms of behavior; creating and preserving a historical record of the events in the former Yugoslavia; stigmatizing persons such as Karadžić and forcing them to relinquish any official power, even if they refuse to surrender into custody; and generating a body of

<sup>67</sup> International Covenant on Civil and Political Rights, Dec. 16, 1965 999 UNTS 171.

<sup>68</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221.

<sup>69</sup> See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, para. 81 (July 8, 1996), reported in 35 ILM 809 & 1343 (1996).



jurisprudence that will undoubtedly continue to build over time and strongly influence the development of international humanitarian law, as well as international law generally.

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## SEXUAL VIOLENCE IN DECISIONS AND INDICTMENTS OF THE YUGOSLAV AND RWANDAN TRIBUNALS: CURRENT STATUS

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 to prosecute war crimes committed during the Yugoslav conflict; the International Criminal Tribunal for Rwanda (ICTR) was established in 1994 to prosecute war crimes committed during the Rwandan civil war.<sup>1</sup> The Yugoslav Tribunal has the competence to try alleged offenders for crimes enumerated in Articles 2–5 of its Statute, namely, grave breaches of the 1949 Geneva Conventions,<sup>2</sup> violations of the laws or customs of war,<sup>3</sup> genocide,<sup>4</sup> and crimes against humanity.<sup>5</sup> Similarly, the Rwandan Statute accords the Tribunal authority to try defendants for crimes enunciated in Articles

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<sup>1</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993) [hereinafter Yugoslav Statute or ICTY Statute]; International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1602 (1994) [hereinafter Rwandan Statute or ICTR Statute].

<sup>2</sup> Gender-based international crimes, aside from those under customary law or emerging jurisprudence, are included in the following acts committed against persons protected by the 1949 Geneva Conventions: "wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health"; and unlawful deportation, transfer or confinement of a civilian. *See* Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 147, 6 UST 3516, 75 UNTS 287 [hereinafter Fourth Geneva Convention].

<sup>3</sup> Gender-based crimes in this category generally consist of violations of common Article 3 of the 1949 Geneva Conventions, which, in pertinent part, prohibits "violence to life and person, in particular . . . mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment." Common Article 3 has attained the status of customary international law, applicable to international or internal armed conflicts. *See especially* Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-AR72, para. 141 (Oct. 2, 1995). Article 27 of the Fourth Geneva Convention, *supra* note 2, requires that women be protected against rape and enforced prostitution. Customary law has prohibited rape crimes for centuries. *See* Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424, 425 (1993).

<sup>4</sup> As contained in the Genocide Convention and reproduced in the Tribunal Statutes, genocide

means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. II, 78 UNTS 277.

<sup>5</sup> A crime against humanity has never been defined in a treaty, and various statutes define it differently. Generally, it is considered to consist of any of the following crimes committed as part of a widespread or systematic attack against a civilian population: murder, extermination, enslavement, deportation, imprison-

2-1, namely, genocide, crimes against humanity, and violations of common Article 3 of the Geneva Conventions and of Additional Protocol II.<sup>6</sup> Article 7, paragraphs (1) and (3) of the ICTY Statute and Article 6, paragraphs (1) and (3) of the ICTR Statute grant jurisdiction to these ad hoc Tribunals to try the accused for individual criminal responsibility on the bases of individual culpability and superior authority.

Women serve in various high-level capacities in the Yugoslav and Rwandan Tribunals. Their presence in decision-making positions represents a monumental advance over women's traditionally minimized role and status in international law bodies or organizations, including in prior international war crimes tribunals.<sup>7</sup> Consequently, the jurisprudence of the United Nations Tribunals reflects women's participation.<sup>8</sup> Since the establishment of the Tribunals, several indictments brought by the Office of the Prosecutor (OTP)<sup>9</sup> have included charges of sexual violence. Indeed, certain decisions, including *Tadić* and, to a much greater extent, *Akayesu*, *Celebići* and *Furundžija*, directly involve many crimes that are committed exclusively or disproportionately against women and girls. The *Akayesu* decision in particular is historic because it authoritatively affirms the intricate linkage of sexual violence to the genocide committed during the Rwandan conflict. In addition, case law from *Furundžija* and *Celebići* will have a significant impact on the treatment of both rape victims and other survivors of torture and other trauma.<sup>10</sup>

It is the purpose of this study to survey current developments of women's issues before the ICTY and the ICTR. The OTP has taken important initiatives by gathering evidence and formulating indictments to bring prosecutions founded on gender-based crimes. The many such indictments illustrate how these charges can be crafted and where further development might be in order, furnishing considerable guidance for future prosecutions of these crimes. While few of these indictments have yet to result in judgments or other decisions by the Tribunal, those that have provide important prece-

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ment, torture, rape, persecution on political, racial or religious grounds, or other inhumane acts. Under the ICTY Statute, the crimes must be committed in connection with an armed conflict. Under the ICTR Statute, the attack must be committed on national, political, ethnic, racial or religious grounds.

<sup>6</sup> Common Article 3 is the term used to designate the identical language of Article 3 of the four Geneva Conventions of August 12, 1949. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, including Annex I, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, including Annexes I-III, 6 UST 3316, 75 UNTS 135; Fourth Geneva Convention, *supra* note 2, including Annexes I-III. Protocol II is the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 UNTS 609. The ICTR Statute, *supra* note 1, in pertinent part, incorporates the following violations from common Article 3 and Additional Protocol II into Article 4: "violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation[,] . . . [o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."

<sup>7</sup> In the past five years, women have made extraordinary advances in international humanitarian law in general, and in international humanitarian law bodies in particular. For a summary of particular women in positions of authority in public international law bodies or institutions, including the war crimes Tribunals, see Kelly Askin, *Introduction to Volume I, in WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* (Kelly D. Askin & Doreen M.oenig eds., forthcoming 1999).

<sup>8</sup> For instance, it is highly unlikely that the *Akayesu* decision, *infra* note 22, which exemplifies a heightened awareness of crimes committed against women, would have demonstrated such gender sensitivity without South African Judge Navanethem Pillay's participation in both the trial and the judgment.

<sup>9</sup> The Tribunals have a common OTP, although each has a separate base—the prosecutor's office of the Yugoslav Tribunal is based in The Hague (where the Tribunal is based) and the prosecutor's office of the Rwandan Tribunal is based in Kigali (the Tribunal is based in Arusha). Patricia Viseur-Sellers is the legal officer for gender-based crimes for both Tribunals.

<sup>10</sup> Determinations by the ICTY Trial Chamber II in the *Furundžija* case at one time threatened to undermine the rights of women and the ability to prosecute crimes committed against them. See briefs cited in note 86 *infra*.

dents in this nascent area of international criminal law that are likely to have enduring and widespread implications. These results will substantially contribute to the international law on gender-based international crimes. Since they are predominantly directed against women and have not received the attention they deserve, these developments are particularly significant. Unlike the Nuremberg and Tokyo Tribunals, which largely ignored gender-based crimes, the ICTY and the ICTR have surmounted reluctance and other obstacles to address these crimes despite their sexually graphic nature and traditional insensitivities to women's rights and needs. The history of impunity for gender-based crimes makes it important to bring these cases to the full attention of the international community.

In the following sections, trials of particular relevance to crimes against women are analyzed, followed by a review of two Rule 61 decisions,<sup>11</sup> which, while not the result of an adversarial process, benefit from judicial review and decision. Finally, indictments that charge the accused with various forms of gender-based violence are reviewed and distinguished.

#### TRIAL DECISIONS IN THE ICTY AND ICTR

The Yugoslav Tribunal, as of October 1998, had nineteen public indictments pending against fifty-six suspects,<sup>12</sup> as well as an undisclosed number of sealed indictments. At least half of the public indictments in the ICTY have brought charges, either separately or in connection with other charges, alleging some form of gender-based violence,<sup>13</sup>

<sup>11</sup> Rule 61 proceedings are used when an initial arrest warrant has not been executed and the accused has not been served. At the initiative of the judge who confirmed the indictment and signed the initial arrest warrant, the trial chamber convenes a hearing during which the prosecutor submits evidence against the accused. If the chamber determines there are reasonable grounds for believing that the crimes were committed as charged, it confirms the indictment and issues an international arrest warrant for the accused. See ICTY, Rules of Procedure and Evidence, Feb. 11, 1994, *reprinted in* 33 ILM 484 (1994), *as revised and amended* July 9–10, 1998, UN Doc. IT/32/Rev.13 (1998); ICTR, Rules of Procedure and Evidence, June 29, 1995, UN Doc. ITR/3/Rev.1 (1995), *as amended* June 1–8, 1998 (5th rev.). For detailed discussion, see Mark Thieroff & Edward A. Amley, Jr., *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 YALE J. INT'L L. 231 (1998); Anne L. Quintal, *Rule 61: The "Voice of the Victims" Screams Out for Justice*, 36 COLUM. J. TRANSNAT'L L. 723 (1998).

<sup>12</sup> See *ICTY at a glance* (updated Oct. 5, 1998) ([www.un.org/icty/](http://www.un.org/icty/)) [hereinafter ICTY Web site]. Many ICTY documents cited below can be found at that site.

<sup>13</sup> These indictments are:

Tadić, No. IT-94-1 (Feb. 13, 1995), *amended*, No. IT-94-1-T (Sept. 1, 1995), *amended*, No. IT-94-1-T (Dec. 14, 1995) (sex crimes were added or charged differently in the three indictment versions; trial concluded; appeal pending)  
 Meakić and others, "Omarska Camp," No. IT-95-4 (Feb. 13, 1995)  
 Sikirica and others, "Keraterm," No. IT-95-8 (July 21, 1995)  
 Karadžić and Mladić, No. IT-95-5 (July 25, 1995)  
 Miljković and others, "Bosanski Šamac," No. IT-95-9 (July 21, 1995)  
 Jelisić and Cesić, "Brčko," No. IT-95-10 (July 21, 1995), *amended*, No. IT-95-10-PT (Mar. 3, 1998)  
 Delalić and others, "Celebići," No. IT-96-21 (Mar. 21, 1996) (trial ongoing since Mar. 10, 1997)  
 Gagović and others, "Foča," No. IT-96-23 (June 26, 1996) (this is the primary sexual violence indictment), *amended*, No. IT-96-23-I (July 13, 1998) (bringing solo charges against one of the accused, Kunarac)  
 Furundžija, "Lašva River valley" (Nov. 10, 1995), *amended*, No. IT-95-17/1-PT (June 2, 1998) (sealed indictment, redacted version)

The Kovačević and Drljaca indictment, No. IT-97-24 (Mar. 13, 1997), containing charges of sexual violence, will not be reviewed because the case is now officially closed (Kovačević died of a heart attack while in custody awaiting the resumption of his trial; Drljaca was killed during arrest). It had been anticipated that this would be the first trial before the ICTY in which the accused answered charges of individual responsibility and superior authority for complicity in genocide for crimes including sexual violence.

particularly sexual violence.<sup>14</sup> Three of these indictments have resulted in judgments after a trial on the merits (*Tadić*, *Furundžija* and *Celebić*<sup>15</sup>), and in certain decisions that could have a considerable impact on women.<sup>16</sup> Two other such indictments supported more than 61 proceedings (*Karadžić and Mladić*,<sup>17</sup> and *Nikolić*<sup>18</sup>). In the Rwandan Tribunal, there were twenty-two indictments current against thirty-five former Rwandan officials.<sup>19</sup> While only two of these indictments have included charges of gender-based crimes (*Akayesu*<sup>20</sup> and *Nyiramasuhuko and Ntahobali*<sup>21</sup>), the *Akayesu* judgment resulted in the most progressive case law on gender ever pronounced by an international judicial body.<sup>22</sup>

### *Tadić—Indictment, Trial and Judgment*

*Tadić*, the first trial held by either UN Tribunal, resulted in many decisions that could have a significant bearing on the future of gender-based crimes under international law that are of particular importance to women.<sup>23</sup> In reaching its verdict, the ICTY trial chamber included specific references to sexual violence and convicted *Tadić* of sex crimes.

Many parts of the second amended indictment<sup>24</sup> addressed sexual violence against males and females. It alleged that Duško *Tadić*, a Serb, had participated in the killing and "maltreatment" of Bosnian Muslims and Croats within and outside Omarska camp (para. 1). Approximately forty women were in Omarska (para. 2.3), where both female and male prisoners were "beaten, tortured, raped, sexually assaulted, and humiliated" (para. 2.6). Similarly, in Trnopolje camp the indictment alleged that female detainees had been subjected to sexual violence (para. 2.7). Count 1 of the indictment charged *Tadić* with a crime against humanity (persecution on political, racial and/or religious grounds), for taking part in a "campaign of terror which included killings, torture, sexual assaults, and other physical and psychological abuse" (para. 4) and for his participation in "the torture of more than 12 female detainees, including several gang rapes" (para. 4.3).<sup>25</sup> Counts 2–4 alleged that *Tadić* had subjected "F" to "forcible sexual intercourse" (para. 5). For

<sup>14</sup> Whereas "sex" refers to biological differences between males and females, "gender" refers to socially constructed differences, taking into account such factors as power imbalances, socioeconomic disparities and culturally reinforced stereotypes. For the UN definition, see Report of the Secretary-General, Integrating the human rights of women throughout the United Nations system, UN Doc. E/CN.4/1997/40, para. 10 (1996).

<sup>15</sup> *Prosecutor v. Tadić*, Opinion and Judgment, No. IT-94-1-T (May 7, 1997) [hereinafter *Tadić* or *Tadić* trial chamber decision]; *Prosecutor v. Furundžija*, Judgment, No. IT-95-17/1-T (Dec. 10, 1998); *Prosecutor v. Delić*, Judgment, No. IT-96-21-T (Nov. 16, 1998).

<sup>16</sup> See especially *Prosecutor v. Furundžija*, Decision [on Defence Motion to Strike Testimony of Witness A], No. IT-95-17/1-T (July 16, 1998); and amicus briefs cited in note 86 *infra*.

<sup>17</sup> *Prosecutor v. Karadžić and Mladić*, Review of the Indictment Pursuant to Rule 61, Nos. IT-95-5-R61, IT-95-18-R61 (July 11, 1996).

<sup>18</sup> *Prosecutor v. Nikolić*, Review of the Indictment Pursuant to Rule 61, No. IT-94-2-R61 (Oct. 20, 1995).

<sup>19</sup> See the Tribunal's Web site (updated Aug. 8, 1998) (www.icty.org) [hereinafter ICTY Web site].

<sup>20</sup> *Akayesu*, No. ICTR-96-4 (Feb. 13, 1996), amended, No. ICTR-96-4-I (June 17, 1997).

<sup>21</sup> *Nyiramasuhuko and Ntahobali*, No. ICTR-97-21-I (May 26, 1997).

<sup>22</sup> *Prosecutor v. Akayesu*, Judgment, No. ICTR-96-4-T (Sept. 2, 1998), available at ICTR Web site, *supra* note 19 [hereinafter *Akayesu* judgment or *Akayesu* trial chamber decision]. An appeal is pending.

<sup>23</sup> Many of the jurisdictional decisions have already been covered extensively in other works and are given only cursory mention here. The trial chamber and appeals chamber decisions on jurisdiction are reported in *Prosecutor v. Tadić*, Jurisdiction, No. IT-94-1-AR72 (Aug. 10, 1995); *Prosecutor v. Tadić*, Appeal on Jurisdiction, No. IT-94-1-AR72 (Oct. 2, 1995), reprinted in 35 ILM 32 (1996). See also Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AJIL 238 (1996); Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadić*, 36 VA. J. INT'L L. 687 (1996); George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AJIL 64 (1996); Virginia Morris, Case note, *Prosecutor v. Kanyabashi*, 92 AJIL 66 (1998).

<sup>24</sup> No. IT-94-1-T (Dec. 14, 1995), *supra* note 13 [hereinafter referred to as the indictment].

<sup>25</sup> The person who made the paragraph 4.3 allegations against *Tadić* was subsequently found to be corrupted, so that testimony and charges alleging that *Tadić* had committed gang rape were withdrawn.

these acts, Tadić was charged with a grave breach (inhuman treatment, Count 2), violation of the laws or customs of war (cruel treatment, Count 3), and a crime against humanity (rape, Count 4).

The indictment further alleged that Tadić and others had beaten prisoners, including Fikret Harambašić, and then forced two other prisoners to commit oral sexual acts on Harambašić and to mutilate him sexually (para. 6). For his participation in these acts, Tadić was charged with grave breaches (torture or inhuman treatment, Count 8; and willfully causing great suffering or serious injury to body and health, Count 9), violations of the laws or customs of war (cruel treatment, Count 10), and crimes against humanity (inhumane acts, Count 11).<sup>26</sup> Although common Article 3(a) of the 1949 Geneva Conventions prohibits mutilation, mutilation was not charged.

*Tadić* was expected to be the first international war crimes trial in history to prosecute rape separately as a war crime, and not solely in conjunction with other crimes.<sup>27</sup> In trial proceedings, however, the OTP was compelled to withdraw the rape charges contained in Counts 2–4 (including crimes against humanity) of the indictment, because witness “F” was too frightened to testify.<sup>28</sup> Then, during trial, the testimony of witness “L” (later identified as Dragan Opacić) was discredited on cross-examination; the OTP investigated and subsequently requested that the Tribunal disregard the evidence presented by this witness.<sup>29</sup> As a result, most reports incorrectly assert that all sexual assault allegations were withdrawn and that the decision did not consider crimes of sexual violence. To the contrary, Tadić was convicted of sex crimes and many of the holdings and dicta in the trial chamber’s decision have considerable relevance to gender issues. The withdrawal of significant parts of the indictment, and the refusal of certain witnesses to testify, did contribute in part to the misperception.<sup>30</sup> In addition, the vague and misleading language of international humanitarian law instruments regarding gender-based violence, including sexual violence, which is essentially reproduced in the Statutes of the Tribunals, was a contributing factor.<sup>31</sup>

The trial chamber’s decision in *Tadić* was rendered on May 7, 1997, by Judge Gabrielle Kirk McDonald (presiding), Judge Ninian Stephen, and Judge Lal Chand Vohrah. The chamber noted that, during confinement in the camps, “both male and female prisoners were subjected to severe mistreatment, which included beatings, sexual assaults, torture and executions” (para. 154). Further, women held in Omarska camp were “routinely

<sup>26</sup> In the original indictment, the sexual mutilation was charged under the various articles of the Statute as torture. See No. IT-94-1, *supra* note 13, paras. 5.23–5.25. The indictment also alleged that Harambašić had died as a result of the assaults, and this was charged as a grave breach (willful killing, Count 5), a violation of the laws or customs of war (murder, Count 6), or a crime against humanity (murder, Count 7).

<sup>27</sup> For an analysis of how previous international war crimes trials could have prosecuted gender-based crimes, including sex crimes, as independent crimes, see KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* 29, 163, 180, 202–03 (1997).

<sup>28</sup> Order on the Prosecution Motion to Withdraw Counts 2 through 4 of the Indictment without Prejudice, No. IT-94-1-T (May 15, 1996).

<sup>29</sup> See MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 108, 167, 171–72, 199–200, 209, 211, 213 (1997).

<sup>30</sup> See *Tadić* trial chamber decision, *supra* note 15, paras. 33, 38, 40, 44, 452.

<sup>31</sup> The author has elsewhere criticized the prevalent use in international humanitarian law of imprecise and inappropriate language as regards gender-based crimes, and urged the OTP and the Tribunal to end this practice of so referring to established or readily identifiable crimes and, instead, to use language that most accurately identifies the crime and its nature. See especially ASKIN, *supra* note 27, at 366–74; and Kelly D. Askin, *Women & International Humanitarian Law*, in 1 *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW*, *supra* note 7. When sexual violence is committed, a charging of, e.g., “outrages upon personal dignity” or “humiliating and degrading treatment” not only mischaracterizes and obscures the nature of the crime, but also perpetuates destructive stereotypes by treating rape as a crime against dignity or honor, instead of a crime of physical, mental and sexual violence. Further, a conviction for a specific form of sexual violence could serve as some deterrent, while a conviction for, e.g., “inhuman treatment” is wholly useless as a deterrent, since the conduct being punished is termed vaguely, and the sexual nature of the crime is indeterminable.

called out of their rooms at night and raped" (para. 165). In one of the most gender-significant paragraphs of the decision, the chamber reported on sexual violence in Črnarska camp, then quoted the testimony of a medical worker at Trnopolje:

Because this camp housed the largest number of women and girls, there were more rapes at this camp than at any other. . . . During evenings, groups of soldiers would enter the camp, take out their victims from the dorm building and rape them. . . . the youngest girl being 12 years of age. In addition, there were women who were subjected to gang rapes; one witness testified that a 19-year-old woman was raped by seven men and suffered terrible pains and came to the clinic for treatment for hemorrhaging. He stated:

The very act of rape, in my opinion—I spoke to these people, I observed their reactions—it had a terrible effect on them. They could, perhaps, explain it to themselves when somebody steals something from them, or even beatings or even some killings. Somehow they sort of accepted it in some way, but when the rapes started they lost all hope. Until then they had hope that this war could pass, that everything would quiet down. When the rapes started, everybody lost hope, everybody in the camp, men and women. There was such fear, horrible. (Para. 175)

It is particularly significant that the trial chamber cited this testimony concerning sexual violence and reproduced testimony attesting to the enormous pain and suffering endured by the women and girls and the community at large as a result of the sexual violence.

In relating the sexual violation of males, the decision noted:

Fikret Harambasic, who was naked and bloody from beating, was made to jump into the pit with them and Witness H was ordered to lick his naked bottom and G to suck his penis and then to bite his testicles. Meanwhile a group of men in uniform stood around the inspection pit watching and shouting to bite harder. . . . Witness H was threatened with a knife that both his eyes would be cut out if he did not hold Fikret Harambasic's mouth closed to prevent him from screaming; G was then made to lie between the naked Fikret Harambasic's legs and, while the latter struggled, hit and bite his genitals. G then bit off one of Fikret Harambasic's testicles and spat it out and was told he was free to leave. (Para. 206)

Among other forms of sexual violence, including sexual mutilation, the above description clearly entails forcing one man to rape another man. Harambasić, Witness H, and "G" were each victims of various forms of sexual violence.

A witness placed Tadić at the crime scene during the time when Harambasić "was attacked and sexually assaulted" (para. 222). However, the trial chamber concluded that, while he may have been present, there was insufficient evidence to conclude that Tadić himself had participated in the attack (para. 228).<sup>32</sup> Regarding the physical or sexual abuse of Harambasić, "G," "H," and others, the chamber found Tadić guilty of violations of the laws or customs of war under Count 10 (cruel treatment) (para. 726). The chamber noted that cruel treatment includes "inhumane acts" that cause "injury to a human being in terms of physical or mental integrity, health or human dignity" and concluded that mutilation and other types of severe bodily harm do constitute inhumane acts (para. 729). The mutilation here is of a sexual nature. For the physical and sexual

<sup>32</sup> See also *Tadić*, *supra* note 15, paras. 237, 242–44. According to testimony, Harambasić was alive after the assault and asked for water (para. 238). Thus, the trial chamber concluded that the OTP had failed to establish beyond a reasonable doubt that Harambasić died as a result of injuries received in this assault, as alleged in Counts 5, 6 and 7 (para. 241). The chamber also found the accused not guilty of grave breaches vis-à-vis Harambasić and others under Counts 5, 8 and 9 because the OTP had failed to prove that the victims were protected persons under the Geneva Conventions (para. 720).

violence inflicted upon Hrambasić and others, Tadić was also found guilty of crimes against humanity under Count 11 (inhumane acts), because the acts were committed as part of a widespread or systematic attack on a civilian population in which "the accused intended for discriminatory reasons to inflict severe damage to the victims' physical integrity and human dignity" (para. 730).

In reviewing paragraph 4 of the indictment alleging "a campaign of terror which included killings, torture, sexual assaults, and other physical and psychological abuse" (para. 377), the trial chamber found Tadić guilty of persecution for what might be termed his inactive participation in this "campaign of terror."<sup>33</sup> Considering discriminatory or persecutorial acts, the chamber noted that there were reports that much of the violence committed against non-Serbs was "motivated by religious and political reasons" and several witnesses testified to hearing discriminatory curses (paras. 467, 469). Since many curses were gendered, and much of the violence was specifically directed against women, the chamber could have determined that persecution on the basis of gender had also been committed.<sup>34</sup>

Significantly, the trial chamber examined the testimony of a survivor of sexual violence. The chamber reported that Suada Ramić, a Muslim woman, testified that she had been raped:

After the rape she was bleeding terribly and went to the hospital where she was told by one of the doctors that she was approximately three to four months pregnant and that an abortion would have to be performed without anaesthetic because there was none.<sup>35</sup> When this doctor asked another doctor for assistance, the second doctor started cursing, saying that . . . all Muslims should be annihilated . . . . [S]he . . . eventually return[ed] to her apartment in Prijedor where she was subsequently raped for a second time by a former Serb colleague who had come to search her apartment. The next day she was taken to the Prijedor police station . . . . She was taken to a prison cell which was covered in blood and where she was raped again and beaten, afterwards being taken to the Keraterm camp . . . . [She was later] transferred to the Omarska camp . . . . Women were called out nightly and raped; on five separate occasions she was called out of her room and raped. As a result of the rapes she has continuing and irreparable medical injuries. (Para. 470)

The trial chamber noted that the treatment received by Suada Ramić and other witnesses was not unique:

A policy to terrorize the non-Serb civilian population of opstina Prijedor on discriminatory grounds is evident and that its implementation was widespread and systematic . . . is apparent. The events described in paragraph 4 of the Indictment, which took place during and were not unrelated to the armed conflict, occurred within this context of discrimination. (Para. 472)

On the basis of credible testimony, the trial chamber found "beyond reasonable doubt that the accused committed the acts described in paragraph 4; when he did so, he was

<sup>33</sup> See *id.*, para. 427, and Judgment, guilty verdict, Count 1.

<sup>34</sup> Perhaps because the indictment limited the charges of persecution to persecution on political, racial and/or religious grounds, under Article 5(h) of the ICTY Statute, the trial chamber did not venture into gender-based persecution. While the OTP is somewhat limited by the terms of the Statute, its silence concerning this issue is an example of the dangers resulting from past discriminatory treatment of women. Thus, women at the camp may have been subjected to rape on the basis of politics, race or religion, but most were simultaneously persecuted on the basis of gender, and the interrelationship of gender with these other factors should not be ignored. If gender were not a factor, grossly disproportionate instances of sexual violence would not be committed against women.

<sup>35</sup> Sexual or physical violence against a pregnant woman that causes a miscarriage should be prosecuted as an additional crime. See ASKIN, *supra* note 27, at 342 n.1071, 372, 399–400. At the Nuremberg trial, this treatment was appropriately labeled "criminal abortion." 6 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 14 NOV. 1945–1 OCT. 1946, at 170 (1947).

aware of the policy of discrimination against non-Serbs, and acted on the basis of religious and political grounds" (para. 477). Even though it was not proven that Tadić himself had committed sexual violence, the chamber held him responsible for his participation in a general campaign of terror, manifested by murder, rape, torture and other forms of violence. The reasoning of the chamber is vital. It found that customary international law imposes "direct individual criminal responsibility and personal culpability for assisting, aiding and abetting, or participating in [a covered criminal act], in contrast to the direct commission of a criminal endeavour or act" (para. 666). The trial chamber cited legal sources in which criminal complicity could be established by knowledge of a criminal effort and continued participation in that effort (paras. 667-90). Thus, in thoughtful and insightful analysis, the chamber wrote:

[A]iding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it. (Para. 689)

Because it was established that Tadić had participated in the seizure and imprisonment of the people within the camps, that the Serbian forces' treatment of Muslim and Croat people was brutal within and outside the camps, that he was aware of a policy that criminally discriminated against and persecuted non-Serbs, and that, regarding the sexual mutilation of Harambasić, he was criminally culpable,<sup>35</sup> Tadić was found guilty of persecution.<sup>37</sup> This persecution included, inter alia, rape and other forms of sexual violence.<sup>38</sup> Thus, "inactive participation" rendered Tadić liable for criminal conduct committed by others. This holding is especially significant because Tadić was merely a low-level civilian traffic officer.<sup>39</sup> In discussing the crime of persecution, the trial chamber did not analyze gender-based discrimination, only persecution on the basis of religion or politics. Perhaps the Tribunal did not address the gendered nature of most forms and instances of sexual violence because Tadić was specifically found guilty of an incident in which a man was sexually violated.

In another ruling favorable to the prosecution of gender-based crimes, the chamber concluded that testimony need not be corroborated. Although the defense argued that the rule *unus testis, nullus testis* (one witness is no witness) should apply, the trial chamber rejected this argument by relying on the Tribunal's Rules of Procedure and Evidence

<sup>35</sup> Regarding the treatment of Harambasić and others, the trial chamber found, beyond a reasonable doubt, that Tadić perpetrated or intentionally assisted in the infliction of physical suffering on them and was therefore individually responsible for those crimes. *Tadić*, *supra* note 15, para. 726.

<sup>37</sup> In the judgment, Tadić was unanimously found guilty of Count 1.

<sup>38</sup> Patricia Viseur-Sellers notes:

The ruling's effect is to recognise that non-physical perpetrators can be liable for sexual violence, under international criminal law, on a theory of aiding and abetting. Tadić's liability is not based on imputation of a subordinate's liability for sexual abuse, rather, it is direct, even though he is not the physical perpetrator nor is he in a position of superior authority. Mere presence does not suffice, yet a knowing presence, inferred even circumstantially, is actionable.

Patricia Viseur-Sellers, *Emerging Jurisprudence of Sexual Violence under International Law*, in CONTEMPORARY INTERNATIONAL LAW ISSUES: NEW FORMS, NEW APPLICATIONS 140, 148 (Proceedings of the Fourth Hague Joint Conference, 1998).

<sup>39</sup> Tadić admits to having been part of a "police unit" (para. 525), although he was primarily involved as a traffic officer (paras. 526, 533). Still, the evidence portrays a man who was exceedingly violent and ruthless against former friends and enemies alike, one who was accorded deference by comrades. There is a clear assumption that he could have prevented violence had he been so inclined.



(especially Subrules 89(C) and (D)), which permit the introduction of "any relevant evidence having probative value . . . unless its probative value is substantially outweighed by the need to ensure a fair trial. Rule 96(I) alone deals with the issue of corroboration, and then only in the case of sexual assault, where it says that no corroboration is to be required" (para. 536). The chamber stressed that this "accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault by the common law" (para. 536),<sup>40</sup> concluding that corroboration is not part of customary international law and need not be required by the ICTY (para. 539).<sup>41</sup>

In a decision that could potentially limit the prosecution of gender-based crimes, the trial chamber held that persecution is a required element of crimes against humanity (paras. 694–713).<sup>42</sup> After reviewing customary law and the ICTY Statute, the chamber arbitrarily concluded that "what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights" and that "this discrimination must be on specific grounds, namely race, religion or politics" in order to constitute persecution (para. 697). Nevertheless, the trial chamber accepted that crimes such as rape may come within the purview of possible persecutorial acts (para. 703). Therefore, while apparently endorsing persecution as a required element of crimes against humanity and seeming to limit the scope of this persecution to race, religion or politics, the chamber nevertheless recognized that sexual violence may constitute persecution.

The *Tadić* trial chamber decision is scattered throughout with what Patricia Viseur-Sellers has referred to as "lots of gems, gold nuggets, and jewels."<sup>43</sup> Even though insufficient evidence was submitted at trial that Tadić himself had committed rape crimes, the evidence did establish that sexual violence was pervasive and rampant and that the consequences for victims and the community were devastating. Therefore, anyone—including nonstate actors and low-level participants—may be convicted of aiding and abetting crimes of physical, mental and sexual violence through continued and knowing participation in, or tacit encouragement of, these crimes.<sup>44</sup>

### *Akayesu—Indictment, Trial and Judgment*

The *Akayesu* case in the Rwandan Tribunal was the first international war crimes trial in history to try and convict a defendant for the crime of genocide. At trial, evidence of rape was heard during courtroom testimony. Consequently, the trial was adjourned while the OTP investigated whether Jean-Paul Akayesu was culpable for crimes of sexual violence. In June 1997, the indictment was amended by Chief Prosecutor Louise Arbour

<sup>40</sup> The trial chamber specifically determined that this rule also applies outside the context of sexual assault testimony. *Tadić*, *supra* note 15, para. 536; see also para. 256.

<sup>41</sup> The ICTR reached the same conclusion in *Akayesu*, *supra* note 22, paras. 132–36.

<sup>42</sup> In contrast, the ICC statute includes persecution as one of 11 possible alternative elements of crimes against humanity. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, July 17, 1998, Art. 7(1), UN Doc. A/CONF.183/9\*, reprinted in 37 ILM 999 (1998) [hereinafter ICC statute].

<sup>43</sup> Comment made at War Crimes Tribunals: The Record and the Prospects, conference at the Washington College of Law, American University (Mar. 31–Apr. 4, 1998).

<sup>44</sup> Although beyond the scope of this article (even though most of the ICTY indictments charge indictees with grave breaches for various rape crimes), it should be noted that a particularly troubling aspect of the decision is the majority's controversial holding regarding grave breaches. For analyses, see Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AJIL 236 (1998); Robert M. Hayden, *Bosnia's Internal War and the International Criminal Tribunal*, FLETCHER F. WORLD AFF., Winter/Spring 1998, at 45; Dorothea Beane, *After the Dusko Tadic War Crimes Trial: A Commentary on the Applicability of the Grave Breaches Provisions of the 1949 Geneva Conventions*, 27 STETSON L. REV. 589 (1997); Askin, *supra* note 31. Judge McDonald correctly and precisely dissented from this portion of the judgment.

to add charges of sexual violence.<sup>45</sup> When the trial resumed, extensive testimony concerning rape and other forms of sexual violence was admitted into evidence.<sup>46</sup> This evidence was used to establish that sexual violence was a fundamental and integral part of the genocide committed during the Rwandan conflict.

Akayesu served as burgomaster of the Taba commune, which gave him exclusive control over the communal police and responsibility for maintaining public order within the commune (paras. 3–4). The indictment<sup>47</sup> defined acts of sexual violence to “include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity” (para. 1(A)). Including offenses such as forced nudity in the indictment supports the view that violence need not result solely from physical violence, but also includes mental violence of this nature.

The indictment alleged that, when Tutsi civilians sought refuge at the bureau communal,

female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. . . . Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated. (Para. 12A)

Akayesu was accused of knowing that the acts of sexual violence and other crimes were being committed and of being present at times during their commission, of having “facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises,” and of having encouraged these acts by failing to prevent them (para. 12B). The indictment thus alleged that Akayesu was criminally responsible for genocide (genocide and complicity in genocide, Counts 1 and 2), and crimes against humanity (extermination, Count 3). Therefore, as part of a package of crimes, Akayesu was charged with genocide, complicity in genocide, and extermination for acts including sexual violence. Further, by his acts or omissions relating to sexual violence at the bureau communal, Akayesu was indicted for crimes against humanity (rape and inhumane acts, Counts 13 and 14).

When the *Akayesu* trial<sup>48</sup> resumed after amending the indictment to bring charges of sexual violence, JJ, a thirty-five-year-old Tutsi woman, testified about “collective rapes”

<sup>45</sup> On women’s groups’ pressure on the OTP to amend the indictment to include sex crimes, see Tina Rosenberg, *New Punishment for an Ancient War Crime*, N.Y. TIMES, Apr. 5, 1998, §4, at 1. See also Amicus Brief regarding Rape in Rwanda, Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence Within the Competence of the Tribunal, *Prosecutor v. Akayesu*, No. ICTR-96-4-T (Sept. 2, 1998) (submitted by Joanna Birenbaum & Lisa Wyndels, Working Group on Engendering the Rwandan Criminal Tribunal; Rhonda Copelon, International Women’s Human Rights Law Clinic; and Jennifer Green, Center for Constitutional Rights) (on file with author). The OTP stated that a witness’s testimony at trial was the impetus for renewing its investigation of sexual violence at Taba and amending the indictment, and that the insufficiency of evidence to charge Akayesu with sexual violence in the original indictment likely stemmed from the stigma attached to rape and insensitivity to sexual violence in the investigation. See *Akayesu* judgment, *supra* note 22, §5.5, Factual Findings, Events Alleged, paras. 416–17.

<sup>46</sup> For a detailed news report on the *Akayesu* trial, and information about the woman who was the lead defense attorney, see Jeffrey Gettleman, *Justice in Rwanda: a momentous task*, ST. PETERSBURG TIMES (Fla.), May 11, 1998, at 1A, available in 1998 WL 4261844.

<sup>47</sup> *Supra* note 20.

<sup>48</sup> Most of the information in this section was gathered from UBUTABERA (Independent Newsletter on the International Criminal Tribunal for Rwanda, Arusha), Oct. 27, 1997.

and forced nudity of women and young girls in the bureau communal in the "close or immediate presence" of Akayesu: "this rape was mostly to humiliate us." She testified that she was raped countless times in the forest before being raped six times in the communal room, and the next day, she and the other women and girls were all raped again. JJ reported that Akayesu said to the Interahamwes: "Don't ever ask me anymore how a Tutsi woman tastes."<sup>49</sup> Other witnesses also testified either to being subjected to sexual violence or to witnessing sexual violence against Tutsi women.

As mentioned above, the *Akayesu* judgment is historic in convicting the accused of the crime of genocide.<sup>50</sup> The decision has additional significance in the prosecution of gender-based crimes in international criminal law: (1) the trial chamber recognized sexual violence as an integral part of the genocide in Rwanda, and found the accused guilty of genocide for crimes that included sexual violence; (2) the chamber recognized rape and other forms of sexual violence as independent crimes constituting crimes against humanity; and (3) the chamber enunciated a broad, progressive international definition of both rape and sexual violence.

Seven witnesses testified at trial to having personally survived and/or witnessed rape or other forms of sexual violence (para. 449). As reported in the judgment, crimes of rape and other forms of sexual violence described by victims and witnesses at trial (although not necessarily characterized as such) included gang rape, public rape, multiple instances of rape, rape with foreign objects, rape of girl-children as young as six years of age, forced nudity, forced abortion, forced marriage,<sup>51</sup> forced miscarriage, rapes specifically intended to humiliate, sexual slavery, forced prostitution, sexual torture and sexual enslavement (paras. 416–60). Frequently, the women and girls were killed after being subjected to sexual violence (paras. 437, 735). Although not alleged to have personally committed these acts himself,<sup>52</sup> Akayesu categorically denied that any rapes were committed at the bureau communal, in his presence or otherwise.<sup>53</sup> However, the trial chamber found "overwhelming evidence" that Akayesu was present for and had witnessed much of the sexual violence (para. 460), and that he had "ordered, instigated and otherwise aided and abetted sexual violence" (para. 452). While some women submitted to rape in hopes of survival, others preferred death (paras. 430, 438). Some women were not killed precisely so they could be raped or subjected to other forms of gender-based violence (paras. 430–31).<sup>54</sup>

<sup>49</sup> *Id.*, Mar. 16, 1998.

<sup>50</sup> See *Akayesu* judgment, *supra* note 22, §5.5, Sexual Violence, paras. 416–60. There does not appear to be any evidence presented at trial alleging that sexual violence was committed against non-Tutsi women or any men in Taba. On October 2, 1998, Akayesu was given three life sentences, plus 80 years for other violations, including rape. See *Rwandan Mayor Sentenced for Genocide: Jailed for Three Lifetimes*, AP, Oct. 2, 1998, available in AFRICA NEWS ONLINE <www.africanews.org/east/rwanda> [hereinafter AFRICA NEWS ONLINE]. Both the OTP and Akayesu have appealed certain aspects of the judgment. *The Jean-Paul Akayesu Case: Parties Appeal*, Oct. 7, 1998, available in *id.* On May 1, 1998, Jean Kambanda pleaded guilty to charges including genocide, and the trial chamber accepted this plea. On September 4, 1998, two days after the *Akayesu* decision, Kambanda was sentenced to life imprisonment. *Prosecutor v. Kambanda*, No. ICTR 97-23-S (Sept. 4, 1998). This sentence is being appealed. *Kambanda Insists Upon the Lawyer of His Choice*, Oct. 14, 1998, available in AFRICA NEWS ONLINE.

<sup>51</sup> "Forced marriage" was reportedly a common form of sexual slavery during the Rwandan conflict. See HUMAN RIGHTS WATCH, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH* 56–62 (1996). In certain *Akayesu* passages, however, it appears that at least on occasion men married women to assist in preventing them from being raped or killed. *Akayesu* judgment, *supra* note 22, para. 430.

<sup>52</sup> *Akayesu* judgment, §5.5, Sexual Violence, para. 452.

<sup>53</sup> The trial chamber expressed incredulity that the defendant would so strongly deny the possibility that sexual violence might have occurred without his awareness of it. See *id.*, §5.5, Sexual Violence, paras. 459–60; §1.4.2, The Accused's line of defence, para. 32.

<sup>54</sup> Notice that the trial chamber decision states: "The aforesaid, however, is subject to the caveat that the crimes must not be committed by the perpetrator for purely personal motives" (para. 637). This is because genocide is a specific-intent crime. Consider the following testimony in *Akayesu*: "[T]wo other younger men,

The trial chamber made the factual and legal determination that Akayesu had committed genocide: "Tutsi women were systematically raped . . . . Furthermore, it is proven that on several occasions, by his presence, his attitude and his utterances, Akayesu encouraged such acts . . . . In the opinion of the Chamber, this constitutes tacit encouragement to the rapes that were being committed" (para. 708). Thus, the trial chamber concluded that sexual violence was an integral part of the genocide committed in Rwanda in general, that it was intricately linked to the genocide committed in Taba in particular, and consequently that Akayesu was accountable for his acts or omissions in the furtherance of genocide.<sup>55</sup> The chamber stressed the linkage between Akayesu's crimes and the pattern throughout the conflict in regard to rape and other forms of sexual violence:

[Rape crimes] constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute . . . one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm. . . . Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

[In the communal bureau] [s]exual violence was a step in the process of destruction of the [T]utsi group—destruction of the spirit, of the will to live, and of life itself. (Paras. 733–34)

Because of the physical, mental and sexual violence inflicted upon Tutsi women, men and the community, Akayesu was found individually criminally responsible for genocide committed in the communal bureau (paras. 735–36).

In yet another precedent-setting aspect of the decision, Akayesu was found guilty of crimes against humanity for rape and other forms of sexual violence, charged as rape (Count 13) and other inhumane acts (Count 14). The trial chamber further noted that

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around the age of 15 or 16, came and asked [the young women] to 'teach them because they didn't know how it was done'. . . . [T]hese two men raped the girls . . ." (para. 431). Particularly when it comes to various forms of sexual violence, it is difficult to distinguish personal motives from political or military purposes.

<sup>55</sup> In *The Law, Genocide*, §6.3.1, when discussing the subparagraphs of the definition of genocide that may constitute gender-based genocide, the *Akayesu* judgment focuses primarily on subparagraph (d), imposing measures intended to prevent births within the group, as constituting various forms of gender-based violence (paras. 508–09). While each of the offenses in subparagraphs (a)–(e) could constitute gender-based violence, subparagraph (b), causing serious bodily or mental harm to members of the group, is most easily satisfied by genocidal rape and other forms of sexual violence and most supports the facts of the case. See ASKIN, *supra* note 27, at 337–44; Askin, *supra* note 31. The trial chamber stated that subparagraph (d), imposing measures intended to prevent births within the group,

should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

. . . .  
 . . . [M]easures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate. (Paras. 508–09)

While extremely useful, these dicta do not address much of the sexual violence described in the facts of the case, which could easily have been done in other paragraphs on genocide, particularly paragraphs 508–05 of the decision. This omission is finally redressed in the legal findings section, paragraphs 733–35, which refers somewhat erroneously back to section 6.3.1 as substantiating its legal findings.

sexual violence also falls within the terms of the ICTR Statute as constituting "outrages upon personal dignity" and as "serious bodily and mental harm" (genocide and violations of common Article 3 and Additional Protocol II). The chamber additionally implied that, on the basis of the sexual violence described in subparagraphs 12(A) and (B) of the indictment, murder, torture, violence to life, health and physical or mental well-being of persons, cruel treatment, and mutilation could have been charged as well (constituting genocide, crimes against humanity, and violations of common Article 3 and Additional Protocol II).<sup>56</sup> This implication contributes to the jurisprudence on gender-based crimes.<sup>57</sup>

Interestingly, Akayesu was found not guilty of violations of common Article 3 for sexual violence charged as cruel treatment (Count 12), and violations of common Article 3 and Additional Protocol II for sexual violence charged as outrages upon personal dignity, in particular rape, degrading and humiliating treatment, and indecent assault (Count 15). This ruling was based on the trial chamber's determination that the OTP had failed to establish that the accused fell "into the class of individuals who may be held responsible for serious violations of international humanitarian law, in particular serious violations of Common Article 3 and Additional Protocol II."<sup>58</sup>

Rape and other forms of sexual violence have never been defined under international law, although indictments may define what the OTP intends when it uses certain terms. In *Akayesu*, the trial chamber articulated a broad and sensible definition of rape and sexual violence:

While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.

. . . .

The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence[, ] which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.<sup>59</sup>

When rape is prosecuted as part of other crimes, additional elements may be required. For example, in prosecuting a crime against humanity, the rape or sexual violence also must be committed as part of a widespread or systematic attack against a civilian population.<sup>60</sup> The trial chamber further emphasized that many rapes amount to torture, such as when "used for such purposes as intimidation, degradation, humiliation, dis-

<sup>56</sup> *Akayesu* judgment, §7.7, Count 13 (rape) and Count 14 (other inhumane acts), para. 692.

<sup>57</sup> However, neither enslavement (crime against humanity) nor enforced prostitution (violation of common Article 3 and Additional Protocol II) was included within the trial chamber's attempt to characterize other justiciable crimes of sexual violence perpetrated in Rwanda.

<sup>58</sup> *Akayesu* judgment, §6.5, The class of perpetrators, paras. 631–35. This section of the judgment is not wholly persuasive. The trial chamber concluded that it was not adequately established that Akayesu had "actively support[ed] the war effort" (a condition it decided is a requirement for a common Article 3 penalty regarding civilians, para. 643), yet went on to find the accused guilty of such crimes as genocide and crimes against humanity (extermination, murder, torture, rape and other inhumane acts). See also paras. 695–96. The chamber suggested, however, that Akayesu could have been found guilty of violating common Article 3 had the charges been more adequately pleaded in the indictment (para. 635).

<sup>59</sup> *Id.*, §6.4, Rape, paras. 597, 599. These crimes were defined in similar language in §7.7, Count 13 (rape) and Count 14 (other inhumane acts)—Crimes against humanity, para. 690 (stating that "[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact," and citing as an example the forcing of a woman to perform gymnastics naked in front of a crowd).

<sup>60</sup> *Id.*, §6.4, Rape, para. 599.

crimination, punishment, control or destruction of a person.” Moreover, “[l]ike torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>61</sup> An official connection should not be required, as customary law is increasingly disfavoring this element. Indeed, the statute of the ICC recognizes that torture, including sexual torture, does not necessarily require state action or authority.<sup>62</sup> The importance of the *Akayesu* judgment was highlighted by Chief Prosecutor Louise Arbour:

The judgement is truly remarkable in its breadth and vision, as well as in the detailed legal analysis on many issues that will be critical to the future of both ICTR and ICTY, in particular with respect to the law of sexual violence. The Court showed great sensitivity to the difficulties of bringing forward the victims who are required to reveal, often in public, the shocking indignities to which they were subjected.<sup>63</sup>

### *Furundžija—Indictment, Trial and Judgment*

The trial of Furundžija in the ICTY posed crucial implications for gender-based crimes. Because the indictment was secret and redacted (edited), and trial testimony was rarely conducted in open court,<sup>64</sup> it is difficult to report on this case accurately and completely. Essentially, the allegations were based on Furundžija’s presence or authority when sexual violence was committed against Witness A, charging that he did nothing to prevent or stop the rape, and that his acts or omissions implicitly encouraged or endorsed the sexual violence, which amounted to aiding and abetting.

The redacted version of the amended *Furundžija* indictment<sup>65</sup> provided details of the charges against Furundžija, local commander of the Jokers.<sup>66</sup> The Croatian Defense Council (HVO) allegedly attacked villages chiefly inhabited by Bosnian Muslims in the Lašva River Valley, harming civilians through death, forced manual labor, torture, “sexual assaults, and other physical and mental abuse” (paras. 3–5). The indictment alleged that at the Jokers’ headquarters, Furundžija, a soldier whom we shall call Accused B (as his name was expunged from the redacted version), and another soldier “interrogated Witness A. While being questioned by Furundžija, [Accused B] rubbed his knife against Witness A’s inner thigh and lower stomach and threatened to put his knife inside Witness A’s vagina should she not tell the truth” (para. 25). Then, Accused B “forced Witness A to have oral and vaginal sexual intercourse with him. Furundžija was present during this entire incident and did nothing to stop or curtail [Accused B’s] actions”

<sup>61</sup> *Id.*, §6.4, Rape, para. 598; §7.7, Count 13 (rape) and Count 14 (other inhumane acts)—Crimes against humanity, para. 689.

<sup>62</sup> ICC statute, *supra* note 42, Art. 7(2)(e).

<sup>63</sup> Statement by Justice Louise Arbour, Press Release, ICTY Doc. CC/PIU/342-E (Sept. 4, 1998), available at ICTY Web site, *supra* note 12. While the judgment is undoubtedly a powerful and important decision, in various places it is abundant in facts but short on law and reasoning to support its determinations.

<sup>64</sup> Rule 79 of the ICTY Rules of Procedure and Evidence, *supra* note 11, allows for closed sessions for all or part of the proceedings for reasons of public order or morality; safety, security or nondisclosure of the identity of a protected victim or witness; or to protect the interests of justice. The same rule is contained in Rule 79 of the ICTR Rules of Procedure and Evidence, *id.*

<sup>65</sup> *Supra* note 13.

<sup>66</sup> Charges were also brought against other unnamed persons. The crimes against them were unspecified owing to the redacted nature of the indictment, but according to the headings, many include allegations of sexual violence. Counts 9–17 allege torture and rape; Counts 18–25 allege torture, rape, and unlawful confinement; Counts 3–4 allege inhumane and cruel treatment; and Counts 5–8 allege torture and murder. Because the language is vague and the allegations redacted, it is unknown if Counts 3–8 contain charges of gender-based violence. Only 2 counts of the 30-count indictment concern Furundžija.

(para. 26).<sup>67</sup> For these acts or omissions, Furundžija was charged in Counts 13 and 14 with a violation of the laws or customs of war (torture and outrages upon personal dignity, including rape).<sup>68</sup>

This was supposed to be a relatively uncomplicated case, focusing on rape crimes committed against one woman during a single day of the Yugoslav conflict.<sup>69</sup> At trial, the defense argued that the case turned on the testimony of one person, the victim.<sup>70</sup> The defense presented a memory expert, Elizabeth Loftus, who has testified for defense positions in hundreds of cases.<sup>71</sup> Her primary thesis is that all memory—even that of nontraumatic events—is flawed and susceptible to influence, and that traumatic events cause additional memory impairment. The defense thus attacked the credibility of the victim's memory, contending that the trauma caused by the rape made her memory of the event unreliable.<sup>72</sup> When Judge May inquired, "Do we really need an expert to establish that memory declines?"<sup>73</sup> some thought that the defense's tactic of bringing in the memory expert had failed. Prosecutor Patricia Viseur-Sellers, in her closing argument, described the harsh reality of most victims of sexual violence, urging that this trial, like other rape trials, was not about the survivor's trying to remember, but enabling her perhaps to forget.<sup>74</sup>

After the trial concluded, the case suddenly took an unexpected turn, raising moral, legal, medical and public policy issues that could have had devastating and far-reaching consequences not only for victims of sexual violence, but for all survivors of traumatic events. On June 29, 1998 (after the trial ended), the OTP revealed to the defense that a redacted certificate and witness statement dated 1995 had been obtained from a psychologist concerning Witness A and the counseling she had received at a therapy center in Bosnia-Herzegovina. In response to this disclosure, the defense filed a motion to strike the testimony of Witness A or, in the event of conviction, to receive a new trial.<sup>75</sup> Even though many trauma

<sup>67</sup> A review of *Furundžija* trial transcript 980622, available at ICTY Web site, *supra* note 12, reveals contradictory statements as to whether or not Furundžija was present throughout the incident, which lasted several hours. Nevertheless, according to these transcripts, it seems indisputable that he was present during portions of the sexual violence and was certainly responsible as a superior for it.

<sup>68</sup> On March 13, 1998, Trial Chamber II-*bis* granted an order allowing the OTP to withdraw Count 12, grave breaches. As a result, on May 21, 1998, counsel for Furundžija filed a motion to dismiss Counts 13 and 14, arguing that torture and rape are not covered by Article 3 of the ICTY Statute, and thus that "Furundžija should be released from custody immediately." *Furundžija* Case: Defendant's Motion to Dismiss the Indictment and to Release the Accused, Press Release, ICTY Doc. CC/PIU/318-E (May 27, 1998). The OTP prevailed on all motions.

<sup>69</sup> *Furundžija* Trial: *Accounts of Sexual Violence*, TRIB. UPDATE, June 8–13, 1998; *Furundžija* trial: *end already in sight*, *id.*, June 15–20, 1998; *Furundžija* trial: *end after only eight working days*, *id.*, June 22–27, 1998, available at ICTY Web site, *supra* note 12. This was not the only sexual violence Witness A suffered; it is merely the only such incident for which Furundžija is charged with responsibility. Because of the redaction, charges against the actual perpetrator are not included in the public part of the indictment, but newspaper accounts assert that after raping her in front of Furundžija, Accused B locked Witness A "in a house where, for about two months, he and some fellow soldiers raped her again and again." Marlise Simons, *Landmark Bosnia Rape Trial: A Legal Morass*, N.Y. TIMES, July 29, 1998, at A3.

<sup>70</sup> Under ICTY Rule 96(I) of the Rules of Procedure and Evidence, *supra* note 11, no corroboration of a sexual assault victim's testimony is required. See notes 40–41 *supra* and corresponding text. In rape cases, particularly in domestic settings, there are seldom witnesses; during wartime situations, it is extremely unlikely that corroborative evidence, such as semen, blood, and other physical or medical evidence, will be available as supporting evidence.

<sup>71</sup> See especially ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE (1991).

<sup>72</sup> See generally *id.*; ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1981); ELIZABETH F. LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE (1996).

<sup>73</sup> *Furundžija* trial: *end after only eight working days*, *supra* note 69.

<sup>74</sup> *Id.*

<sup>75</sup> See *Furundžija*, Defendant's Motion to Strike the Testimony of Witness A, No. IT-95-17/1-T (July 9, 1998) (asserting that the OTP had intentionally failed to disclose evidence of psychological condition and treatment that could affect witness's ability to testify accurately about the crime committed against her); *Furundžija*, Prosecutor's Response to Motion to Strike Testimony of Witness A, No. IT-95-17/1-T (July 13, 1998) (asserting that the documents did not in any way relate to the ability of Witness A to testify accurately, that there

victims suffer psychological stress and receive counseling or treatment, and numerous rape victims suffer from rape trauma syndrome (a form of post-traumatic stress disorder),<sup>76</sup> what is particularly interesting here about the trial chamber's reaction to the nondisclosure is that, although the OTP had not disclosed the certificate and psychologist's statement (because of privacy issues and relevancy criteria), it had apparently given timely notice to the defense that Witness A had been to the treatment center and that a tape might be available of an interview of the witness at the center. Thus, the defense could presumably have gathered this information independently.<sup>77</sup> Additionally, it was apparent to all at trial, including the judges, that Witness A had undergone rape counseling.<sup>78</sup> Nevertheless, the OTP was reprimanded and the witness penalized for failing to have previously disclosed the certificate and witness statement.

Arguably, the trial chamber wrongfully decided that the nondisclosure of the evidence concerning Witness A's counseling had resulted in "serious misconduct" and that the best way to resolve the dispute over the victim's ability to testify accurately and truthfully and to remedy the purported prejudice suffered by the defense was to reopen the case. Referring to Witness A's testimony as "pivotal" to the OTP's case, the chamber stated in its findings: "The accused's defence has been conducted on the basis that Witness A's memory was flawed. Any evidence relating to the medical, psychiatric or psychological treatment or counselling that this witness may have received is therefore clearly relevant and should have been disclosed to the Defence."<sup>79</sup> Consequently, the chamber ordered that, after the reopening of the trial, the defense could recall any prosecution or defense witness to address "any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993" (e.g., since the sexual violence was committed) and could offer new evidence addressing these issues.<sup>80</sup> Further, "[t]he Prosecution shall disclose . . . documents in their possession relating to the Material<sup>81</sup> and relevant to the issue of any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993."<sup>82</sup>

This extremely broad order invades the victim's privacy, allowing access to all medical, psychiatric and psychological records, regardless of any relevance these records may have to memory or the trial testimony.<sup>83</sup> At a minimum, these records should have first been

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was no duty to disclose them as they revealed nothing that distinguished this case from any other rape case, and that the defense greatly exaggerated their significance) [hereinafter Prosecutor's Response].

<sup>76</sup> See, e.g., EDNA B. FOA, *TREATING THE TRAUMA OF RAPE* (1998); INTERNATIONAL RESPONSES TO TRAUMATIC STRESS: HUMANITARIAN, HUMAN RIGHTS, JUSTICE, PEACE AND DEVELOPMENT CONTRIBUTIONS, COLLABORATIVE ACTIVITIES AND FUTURE INITIATIVES (Yael Danieli et al. eds., 1996); JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC VIOLENCE TO POLITICAL TERROR* (1992).

<sup>77</sup> Prosecutor's Response, *supra* note 75, at III(vii). The OTP had not been able to confirm the existence of the video tape. Because the trial chamber had previously filed a formal complaint regarding the OTP's conduct, the defense cleverly seized the opportunity to allege misconduct against the OTP for failing to disclose the material. See *Furčadžića*, Trial Chamber's Formal Complaint to the Prosecutor, No. IT-95-17/1-PT (June 5, 1998).

<sup>78</sup> Decision, *supra* note 16, para. 18 (stating that it was "obvious" in pre-trial proceedings and at trial that she had received "either counselling or treatment as a result of the events which she endured"). Neither the OTP nor the witness made efforts either to hide or to advertise this fact—seeking help to cope with the violence was simply treated as natural.

<sup>79</sup> *Id.*

<sup>80</sup> Decision, *supra* note 16, at IV, Disposition, A(1)–(2).

<sup>81</sup> The "Material" is a redacted certificate and the witness statement, both dated 1995, referred to in text at note 75 *supra*. As mentioned, the Material was essentially the reason for reopening the trial.

<sup>82</sup> Decision, *supra* note 16, at IV, Disposition, B(1).

<sup>83</sup> The trial chamber in *Akayesu* provides guidance on a similar issue:

[T]he onus is on the party pleading a case of false testimony to prove the falsehoods of the witness statements . . . .



reviewed *in camera* by the trial chamber to determine whether they contained, as the prosecutor claimed, nothing that distinguishes this rape victim from any other rape victim, and thus were irrelevant,<sup>84</sup> or whether they contained, as the defense claimed, evidence supporting their assertion that the witness's memory was in doubt, in which case the nondisclosure was prejudicial to the defense and measures must indeed be taken to redress the harm.<sup>85</sup> The wording of the order raised grave concerns not only over violations of privacy, but also over the possibility that traumatic events in general, and receiving counseling and/or treatment in particular, may put testimony of survivors in jeopardy by undermining the credibility of their recollection of the event in question (or perhaps even of their testimony about other unrelated events).<sup>86</sup>

The defense appealed the chamber's decision to reopen the case;<sup>87</sup> this appeal was denied by the appeals chamber.<sup>88</sup> Significantly for gender-based crimes, however, on December 10, 1998, the trial chamber rendered its judgment, finding Furundžija guilty of both charges alleging violations of the laws or customs of war, and sentencing him to ten years' imprisonment for torture and eight years' imprisonment for outrages upon personal dignity, including rape. Because the sentences are to be served concurrently, Furundžija will serve ten years, less the credit for time already served.<sup>89</sup> The chamber specifically noted that, "even when a person is suffering from PTSD [post-traumatic stress disorder], this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness" (para. 109). While not only the verdict, but also much of the language are excellent and sensitive to gender-based crimes, the trial chamber's elaboration of elements of rape may actually amount to a regression from the broad definition established in *Akayesu*.<sup>90</sup> Nonetheless, as a whole, the judgment does serve significantly to expand protections to victims of gender-based crimes.

### *Delalić and Others, "Celebići"—Indictment, Trial and Judgment*

Zejnik Delalić and three others were charged<sup>91</sup> with grave breaches and violations of the laws or customs of war. Delalić, Zdravko Mucić, and Hazim Delić held positions of

. . . [T]estimony is based mainly on memory and sight, two human characteristics which often deceive the individual . . . . Hence, testimony is rarely exact as to the events experienced. To deduce from any resultant contradictions and inaccuracies that there was false testimony, would be akin to criminalising frailties in human perceptions.

*Akayesu* trial chamber decision, *supra* note 22, at 4, Evidentiary Matters, False testimony, paras. 139–40. When the defense challenged the credibility of rape victims on the basis of inconsistent testimony, the chamber stated that it had "considered the discrepancies which have been alleged with regard to the witnesses who testified on sexual violence and finds them to be unfounded or immaterial." *Id.*, §5.5, Sexual Violence, Factual findings, paras. 454–55.

<sup>84</sup> *Furundžija*, Prosecutor's Response, *supra* note 75, para. III(9)(ii).

<sup>85</sup> *Furundžija*, Defendant's Motion to Strike the Testimony of Witness A, *supra* note 75.

<sup>86</sup> See Amicus Brief on Protective Measures for Victims or Witnesses of Sexual Violence and Other Traumatic Events, Submitted by the Center for Civil and Human Rights, Notre Dame Law School, Prosecutor v. *Furundžija*, No. IT-95-17/1-T (Dec. 10, 1998) (on file with author); Amicus Brief Submitted by Joanna Birenbaum and Valerie Oosterveld of the International Human Rights Programme, Faculty of Law, University of Toronto (Working Group on Engendering the Rwanda Criminal Tribunal), *Furundžija*, *supra* (on file with author).

<sup>87</sup> *Furundžija*, Defendant's Request for Leave to Appeal and Proposed Appeal of Trial Chamber II's Order, No. IT-95-17/1-AR73 (July 23, 1998); *Furundžija*, Prosecutor's Amended Response to the Defence Request for Leave to Appeal, No. IT-95-17/1-AR73 (Aug. 6, 1998); *Furundžija*, Reply Brief in Support of Defendant's Proposed Appeal, No. IT-95-17/1-AR73 (Aug. 7, 1998).

<sup>88</sup> *Furundžija*, Decision on Defendant's Request for Leave to Appeal, No. IT-95-17/1-AR73 (Aug. 24, 1998).

<sup>89</sup> *Furundžija*, *supra* note 15. Because the decision was handed down as this report was going to press, it can be given only brief notice here.

<sup>90</sup> *Id.* See especially paras. 179, 185.

<sup>91</sup> See *supra* note 13.

authority at Celebići camp; Esad Landžo was a camp guard (para. 7).<sup>92</sup> The indictment alleged that Delić had directly participated in certain identified acts (para. 8). In Celebići, detainees were subjected to physical and sexual violence and other forms of mistreatment (para. 2). According to the indictment, Delić and others subjected Cecez to "repeated incidents of forcible sexual intercourse. On one occasion, she was raped in front of other persons, and on another occasion she was raped by three different persons in one night" (para. 24). For these acts and omissions, Delić was charged with a grave breach (torture, Count 18) and violations of the laws or customs of war (torture, Count 19) or, alternatively, violations of the laws or customs of war (cruel treatment, Count 20). The indictment further alleged that Delić personally subjected Witness A to "repeated incidents of forcible sexual intercourse, including both vaginal and anal intercourse," during a six-week period (para. 25). Delić was also charged with responsibility for a grave breach (torture, Count 21) or a violation of the laws or customs of war (torture or cruel treatment, Counts 22 and 23).

Cecez was subjected to multiple rape, public rape, and gang rape; Witness A was subjected to vaginal and anal intercourse, rape during interrogation, and multiple instances of rape. Both series of offenses were charged in exactly the same way. Delalić, Mucić and Delić were charged as superiors for causing great suffering or serious injury as a result of certain acts committed by Landžo, including "the placing of a burning fuse cord around the genital areas of" a detainee (para. 31). In addition, the three superiors were charged with responsibility for grave breaches (willfully causing great suffering or serious injury, Count 38) and violations of the laws or customs of war (cruel treatment, Count 39). Delalić, Mucić and Delić were also charged on grounds of superior authority for "inhumane acts committed in Celebici camp, including forcing persons to commit fellatio with each other" and for using an electrical current device to inflict pain on the detainees (para. 41) (the latter committed by Delić, who was charged both as a direct participant and for superior authority); these charges were categorized as a grave breach (inhuman treatment, Count 44) and a violation of the laws or customs of war (cruel treatment, Count 45).

The *Celebići* judgment was rendered on November 16, 1998, finding three of the four accused guilty of several of the counts against them.<sup>93</sup> In this lengthy (nearly five-hundred-page) decision, the trial chamber greatly developed the principle of command responsibility, including responsibility for gender-based crimes, and specifically recognized rape as torture. The primary defect of the decision is its use of concurrent sentencing, in which the sentences are served simultaneously. Thus, while Mucić, for instance, was found guilty of eleven crimes and given a seven-year sentence for each one, instead of serving seventy-seven years, he will have to serve only seven years' total detention time. Similarly, even though Delić was found guilty of various heinous crimes—indeed, the chamber noted that he showed no remorse and took "sadistic

<sup>92</sup> While a camp guard also held a position of authority, the indictment brought charges in which Landžo was the subordinate of the other three indictees and did not charge him with crimes committed by persons under his authority. In a sensational turn of events, during the *Celebići* trial Landžo took the stand to testify that he had committed the crimes in an effort to be a "perfect soldier," one who followed the orders of his superiors, particularly those of Mucić and Delić, without question. Landžo testified that while carrying out orders, he "forced two brothers to perform oral sex on each other. He then tied slow-burning fuses to their genitals, and then lit them." Next, Delić took over, stating he would show Landžo "how to interrogate a Četnik." See Mirko Klarin, "Perfect Soldier" Confession, TRIB. UPDATE, July 27–Aug. 1, 1998, available at [www.ijt.org](http://www.ijt.org).

<sup>93</sup> Delalić, *supra* note 15. The judgment was handed down after this report was written. Both the timing and the great length of the judgment prevented its being given more than brief treatment here.

pleasure" in causing pain and suffering (para. 1254)—the fifteen-year sentence for rape as torture is somewhat gratuitous, as it is subsumed within the longest, the twenty-year, sentences, for willful killing and murder.

#### RULE 61 DECISIONS

The trial chambers of the Yugoslav and Rwandan Tribunals have had many occasions to make legal determinations outside of judgments on the merits, and one of these areas is in Rule 61 proceedings. While not as powerful or persuasive as trial judgments where determinations are made on the basis of evidence submitted by both sides, Rule 61 decisions, which are stronger than indictments, are judicial determinations that carry ample weight. Two such decisions rendered by the ICTY that have particular relevance to gender-based crimes are discussed here.

In the *Karadžić and Mladić* Rule 61 decision,<sup>94</sup> ICTY Trial Chamber I, consisting of Judge Jorda (presiding), Judge Odio Benito and Judge Riad, addressed crimes of sexual violence and inferred that forced impregnation may constitute evidence of genocidal intent. Thus, in describing sexual assault as a method of "ethnic cleansing," it was noted that sexual assaults and intimidation of the populace were carried out even before hostilities began. As regards the camps, the decision noted that "[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late for them to undergo an abortion." Rape or sexual slavery for personal purposes was also referenced. The chamber then concluded:

On the basis of the features of all these sexual assaults, it may be inferred that they were part of a widespread policy of "ethnic cleansing": the victims were mainly "non-Serbian" civilians, the vast majority being Muslims. Sexual assault occurred in several regions of Bosnia and Herzegovina, in a systematic fashion and using recurring methods (e.g. gang rape, sexual assault in camps, use of brutal means, together with other violations of international humanitarian law). They were performed together with an effort to displace civilians and . . . to increase the shame and humiliation of the victims and of the community they belonged to in order to force them to leave. It would seem that the aim of many rapes was enforced impregnation; several witnesses also said that the perpetrators of sexual assault—often soldiers—had been given orders to do so and that camp commanders and officers had been informed thereof and participated therein. (Para. 64)

Clearly, the trial chamber found the evidence of widespread sexual violence credible, and concluded that the evidence suggested that sexual violence was intimately linked to the practice of "ethnic cleansing" in the Yugoslav conflict.

In the *Nikolić* Rule 61 decision,<sup>95</sup> the same ICTY trial chamber invited the prosecution to amend the indictment to add charges of rape and other forms of sexual assault, "either as a crime against humanity or as grave breaches or war crimes" (para. 33). The chamber also emphasized that it "considers that rape and other forms of sexual assault inflicted on women in circumstances such as those described by the witnesses, may fall within the definition of torture submitted by the Prosecution" (para. 33).

In these two Rule 61 decisions, Trial Chamber I appeared to be urging the OTP to broaden its application of charges of sexual violence and it demonstrated willingness to explore all pertinent aspects of these crimes.

<sup>94</sup> *Supra* note 17.

<sup>95</sup> *Supra* note 18.

## OTHER ICTY AND ICTR INDICTMENTS

The following indictments, which include gender-based crimes,<sup>96</sup> have yet to reach judgment but nevertheless provide important information on how these charges might be brought under existing law and what issues remain for future resolution. The indictments are discussed in chronological order according to the date of the original indictment.

*Yugoslav Tribunal Indictments*

*Meakić and others.* The indictment against Meakić and others<sup>97</sup> is primarily based on superior authority—crimes committed by subordinates that are legitimately imputed to their leaders—although allegations additionally include acts perpetrated personally by superiors. The indictment alleges that Serb forces “regularly and openly killed, raped, tortured, beat, and otherwise subjected prisoners to conditions of constant humiliation, degradation, and fear of death” (para. 19.2). Zeljko Meakić was the camp commander, and Miroslav Kvočka and Dragoljub Prcac were his deputies, also in positions of authority. Mladen Radić, Milojica Kos and Momcilo Gruban were shift commanders in positions of authority over guards working during their shift and others entering the camp during their shift. Eight other persons accused in the original indictment were guards; five others visited the camp and allegedly participated in abuses.<sup>98</sup> Thus, the six in positions of authority were indicted for criminal responsibility for the acts, including sexual violence, committed by their subordinates, charged as crimes against humanity (rape) (para. 19.9). Radić was also charged with personally subjecting “A” to “forcible sexual intercourse” on five separate occasions. Each incident was charged separately, each time as a grave breach (willfully causing great suffering), a violation of the laws or customs of war (cruel treatment), and a crime against humanity (rape) (paras. 22.2–22.16).

*Sikirica and others, “Keraterm.”* Leadership responsibility for crimes committed by subordinates is also a dominant principle of this indictment,<sup>99</sup> although here, the Keraterm camp commander, Duško Sikirica, was also charged with genocide. Shift commanders, guards and persons who visited the camp and allegedly participated in abuses were also charged. The indictment asserts that Serb forces had unlawfully seized and confined more than three thousand Bosnian Muslims and Bosnian Croats, many of whom were taken to Keraterm camp where they lived in “inhumane conditions,” and where detainees were physically and sexually assaulted, often in view of other detainees (paras. 1, 12.2). Sikirica was charged with intent to destroy “the Bosnian Muslim and Bosnian Croat people as national, ethnic, or religious groups,” amounting to complicity in genocide because of his alleged responsibility for the killing of members of the groups, the causing of serious bodily or mental harm to members of the groups, and the deliberate infliction of conditions of life on members of the groups calculated to bring about their physical destruction, in whole or in part (para. 12, Counts 12.1–12.3). Because certain prisoners were forced to engage in various humiliating and/or painful acts, including fellatio (paras. 19–20), the indictment alleges that, “by participating in forcing [X and Y] to engage in the degrading, humiliating and/or painful acts,” the accused had committed

<sup>96</sup> A substantial amount of information contained in the following section was derived from the ICTY Web site, *supra* note 12, and from [www.igc.apc.org/wcw/icty](http://www.igc.apc.org/wcw/icty).

<sup>97</sup> *Supra* note 13.

<sup>98</sup> The original indictment contained allegations against 19 accused. See *War crimes court revokes indictments against 14 Bosnian Serbs*, Agence France-Presse, May 8, 1998, available in 1998 WL 2277023.

<sup>99</sup> This indictment originally charged 14 Bosnian Serbs for alleged crimes. See *id.* For the indictment, see *supra* note 13.

a grave breach (great suffering), a violation of the laws or customs of war (cruel treatment), and a crime against humanity (inhumane acts) (paras. 19.2–19.2.3 and 20.2–20.2.3). Rape was not charged.

*Karadžić and Mladić.* Radovan Karadžić and Ratko Mladić are considered by many to be among the most culpable parties involved in the conflict. Karadžić, among other positions, was President of the Serbian Democratic Party (SDS); Mladić, among other positions, was commander of the Bosnian Serb army. Both held positions of superior authority. Indeed, Karadžić and Mladić were considered key leaders of the conflict, the orchestrators of the Bosnian Serb practice of “ethnic cleansing,” and of inciting or ordering war crimes. The indictment<sup>100</sup> states that Karadžić and Mladić, “by their acts and omissions, and in concert with others, committed a crime against humanity by persecuting Bosnian Muslim and Bosnian Croat civilians on national, political and religious grounds. [They are] criminally responsible for the unlawful confinement, murder, rape, sexual assault, torture, beating, robbery and inhumane treatment of civilians” (para. 19). The indictment further alleges: “In many instances, women and girls who were detained were raped at the camps or taken from the detention centres and raped or otherwise sexually abused at other locations” (para. 22). The allegations further assert that Karadžić and Mladić “knew or had reason to know” that subordinates were killing or causing “serious physical or mental harm to Bosnian Muslims and Bosnian Croats with the intent to destroy them, in whole or in part, as national, ethnic or religious groups” or that subordinates had already done so and the superiors failed to take necessary and reasonable measures to prevent such acts in the future or to punish the perpetrators (paras. 32, 33). By these acts and omissions, Karadžić and Mladić were charged as superiors with responsibility for genocide (killing members of the group, causing serious bodily or mental harm to members of the group, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Count 1). They were charged on the basis of individual responsibility and superior authority with committing a crime against humanity (persecution on political, racial and religious grounds, Count 2). Incorporating paragraphs 18 and 20–22 into an unlawful detention charge, the indictment alleges that conditions in the facilities were inhumane, with detainees subjected to rape and other forms of sexual violence. Thus, by these acts and omissions, Karadžić and Mladić were individually and as superiors charged with committing a grave breach (unlawful confinement of civilians, Count 3) and violations of the laws or customs of war (outrages upon personal dignity, Count 4). For the crimes alleging physical and sexual violence, the charge was framed merely as a violation of the laws or customs of war constituting “outrages upon personal dignity,” an elusive and inappropriate depiction of the atrocities committed.

*Miljković and others, “Bosanski Šamac.”* Slobodan Miljković and five others<sup>101</sup> were charged with crimes against persons who lived in Bosanski Šamac.<sup>102</sup> In this municipality, Serb forces operated camps where prisoners were physically and sexually mistreated (para. 5(b)). One of the accused, Stevan Todorović, “forced Witness A and Witness B to perform sexual acts upon each other in the presence of several other prisoners and guards.” For these acts, Todorović was charged with instigating, ordering, and committing a grave breach (inhuman treatment, Count 36), a violation of the laws or customs of war (humiliating and degrading treatment, Count 37), and a crime against humanity

<sup>100</sup> *Supra* note 13.

<sup>101</sup> For the indictment, see *supra* note 13.

<sup>102</sup> On August 7, 1998, Miljković was shot to death in the Serbian town of Kragujevac, reportedly by a police official. See Mirko Klarin, *Death of a Fugitive*, TRIB. UPDATE, Aug. 3–8, 1998, available at ICTY Web site, *supra* note 12.

("rape, which includes other forms of sexual assault," Count 38). Thus, in distinction from the Keraterm indictment, here rape and other forms of sexual violence were charged for forcing two prisoners to perform sexual acts on each other. In addition, "Simić knew or had reason to know that Stevan Todorović was about to commit such acts or had done so" (para. 34); consequently, Simić was charged under the principle of superior authority with criminal responsibility for the sexual violence as a grave breach (inhuman treatment, Count 51), a violation of laws or customs of war (humiliating and degrading treatment, Count 52), and crimes against humanity (rape or other forms of sexual assault, Count 53). Thus, the individual directly responsible for the sexual violence and the superior who failed to prevent, stop, or punish him were charged under exactly the same articles and subarticles.

*Jelić and Cesić, "Brčko."* Ranko Cesić acted under the apparent authority of the Brčko police and held a position of authority at Luka camp. At the camp, Cesić allegedly forced two Muslim brothers "to beat each other and perform sexual acts on each other in the presence of others, causing them great humiliation and degradation" (para. 32). Cesić was charged<sup>103</sup> with instigating, ordering, or committing a violation of the laws or customs of war (humiliating and degrading treatment, Count 34) and crimes against humanity (rape, which includes other forms of sexual assault, Count 35).

*Gagović and others, "Foča."* Two days after the Foča indictment was issued, a headline on the front page of the *New York Times* declared, "For First Time, Court Defines Rape as War Crime," and asserted:

This is a landmark indictment because it focuses exclusively on sexual assaults, without including any other charges. . . . There is no precedent for this. It is of major legal significance because it illustrates the court's strategy to focus on gender-related crimes and give them their proper place in the prosecution of war crimes.<sup>104</sup>

The charges brought in this indictment are unparalleled in international, regional or national courts. This case has the potential to establish powerful, reformatory and far-reaching precedents. The primary shortcoming of the indictment is the omission of appropriate charges of genocide.

Dragan Gagović was chief of police in Foča, where, among other things, he oversaw the detention of all female prisoners (para. 3.1); six other indictees were subcommanders of the military police and Radovan Stanković was a member of the Serb elite paramilitary unit. Persons cited in the indictment as having criminal responsibility as superiors include Gagović, Gojko Janković and Dragoljub Kunarac (paras. 3.1–3.3).<sup>105</sup>

Forcible sexual penetration is defined in the indictment as "penetration, however slight, of the vagina, anus or oral cavity, by the penis. Sexual penetration of the vulva or anus is not limited to the penis."<sup>106</sup> In respect of certain counts, Gagović, Janković and Kunarac were charged with individual responsibility and superior authority (para. 4.12).

<sup>103</sup> See *supra* note 13.

<sup>104</sup> Marlise Simons, *For First Time, Court Defines Rape as War Crime*, N.Y. TIMES, June 28, 1996, at 1 (quoting Christian Chartier).

<sup>105</sup> The Foča indictment, *supra* note 13, has since been amended to bring charges exclusively against Kunarac, as discussed *infra*.

<sup>106</sup> *Gagović*, *supra* note 13, para. 4.8. The language changed from "intercourse" in previous indictments to "penetration" in this indictment. "Forcible" is still present, which is better than "forced" but could still conceivably be interpreted as excluding coercion or intimidation. "Consent" is not a constituent element of the crime, so the burden is on the defense to prove consent, instead of on the prosecution to prove there was no consent. The indictment asserts that forcible sexual intercourse can be an "element of a crime against humanity (enslavement under Article 5(c), torture under Article 5(f), rape under Article 5(g)), violations of the laws and customs of war (torture under Article 3 and Article 3(1) (a) of the Geneva Conventions) and a grave breach of the Geneva Conventions (torture under Article 2(b))." *Id.* Other subarticles are also applicable.

Because gender-based violence is almost the exclusive focus of the Foča indictment, and the language varies in several of the charges, the allegations in each count are briefly reviewed separately below.

In Counts 1–12, Janković, Janjko Janjić, Dragan Zelenović and Zoran Vuković were charged with interrogating women at Buk Bijela regarding “the hiding-places of the male villagers and weapons. The accused allegedly threatened the women with murder and sexual assault if they lied” (para. 5.3). Women suspected of lying were allegedly subjected to vaginal penetration, fellatio and gang rapes (paras. 5.4–5.7). On the basis of these accusations, Janković, Janjić, Zelenović and Vuković were each charged in Counts 1–12 with crimes against humanity (torture, rape), grave breaches (torture), and violations of the laws or customs of war (torture).

The accused were charged in Counts 13–28 with committing various forms of sexual violence at Foča High School, including gang rapes, multiple rapes, vaginal and anal rapes, fellatio and public rapes (paras. 6.4–6.13). Indeed, “The physical and psychological health of many female detainees seriously deteriorated as a result of these sexual assaults. . . . Some of the sexually abused women became suicidal. Others became indifferent as to what would happen to them and suffered from depression” (para. 6.5). Zelenović, Janjić, Vuković and Janković were each charged in Counts 13–28 with exactly the same crimes and elements as in Counts 1–12.

Counts 32–35 concern what happened after FWS–48 reportedly complained to Gagović about the sexual assaults committed at the Partizan Sports Hall. According to the indictment, to punish or intimidate her for reporting the crimes, Gagović raped FWS–48 (vaginal and anal penetration and fellatio), then threatened, intimidated and coerced her, “saying that he would find her in five different countries if she told anyone” (para. 8.1). For these acts, Gagović was charged with committing the same crimes as charged previously under Counts 1–12 and 13–28.

Counts 36–55 involve alleged multiple rapes, gang rapes, vaginal penetration, fellatio and anal penetration rapes at the sports hall. The indictment alleges that one victim was told she would now “give birth to good Serbian children”; another (presumably Muslim) rape victim was threatened with baptism. Exceedingly painful and reproductively destructive rapes were commonplace. Counts 36–55 charge Janjić, Kunarac, Vuković, Janković and Zelenović in exactly the same way as the previous counts. These allegations could have been charged as genocide, since the intent to destroy a protected group appears to be present. The following sections of the indictment enumerate different charges for both similar and differing crimes as those alleged above in this indictment.

Counts 29–31 also deal with Gagović’s involvement in events at the Partizan Sports Hall. Partizan reportedly functioned as a detention center for women, children and elderly Muslim civilians (para. 7.1). Living conditions there were purportedly “brutal,” characterized by “inhumane treatment, unhygienic facilities, overcrowding, starvation, physical and psychological torture, including sexual assaults. . . . Some women were beaten and in need of urgent care. Women bled and suffered pain as a result of sexual abuse” (para. 7.4). According to the indictment, women either were subjected to violence in Partizan or were removed from the facility and subjected to gang rapes, multiple rapes and public rapes elsewhere (paras. 7.5–7.8). As a result, “[m]any women suffered permanent gynaecological harm. . . . At least one woman can no longer have children” (para. 7.10). For these alleged acts or omissions, Gagović was charged with a crime against humanity (persecution on political, racial and/or religious grounds, Count 29), a grave breach (willfully causing great suffering, Count 30), and a violation of the laws or customs of war (outrages upon personal dignity, Count 31). Thus, while this charge broadens the scope of the crimes for which Gagović was indicted, the charges

could arguably have been further broadened to include genocide for crimes committed against these Muslim women, with the intent to destroy them and their associated group.<sup>107</sup>

Counts 56–59 allege that three women were taken from the Montenegrin headquarters in Foča to the Miljevina Hotel in retaliation for having reported the living conditions in the Partizan Sports Hall to journalists. Pero Elez, who commanded an elite unit of soldiers headquartered in the hotel, allegedly ordered the women detained in a house owned by Karaman where they were subsequently joined by other women and girls, some as young as twelve. With the death of Elez, Stanković was put in charge of Karaman's house, which he ran like a brothel for the soldiers (para. 10.1). As described in the indictment, although the detainees had food and were neither guarded nor locked in, they could not escape because the territory was surrounded by Serbs (para. 10.2). Nine women and girls were detained for three months, during which time they were subjected to repeated rapes and other forms of sexual violence during the night, and manual labor during the day. On the basis of these allegations, Stanković was charged with committing crimes against humanity (enslavement and rape, Counts 56 and 57), a grave breach (inhuman treatment, Count 58), and violations of the laws or customs of war (outrages upon personal dignity, Count 59). This was the first time enslavement was charged for crimes of sexual violence. Perhaps the critical factor was the link with a brothel-like facility.

Count 60 alleges that four women were taken by Zelenović, Janković and Janjić from Karaman's house to Foča, where they were detained at various dwellings and repeatedly subjected to sexual violence by the accused (paras. 11.1–11.2). All were charged with crimes against humanity (rape, Count 60).

Counts 61–62 contain the charges against Kovac, who was in charge of an apartment in Brena. There he allegedly detained FWS-75 for one month and FWS-87 for three months, as well as two other women he received from Zelenović, Janković and Janjić (para. 12.1). According to the indictment, during their detention the women were required to perform household chores and were frequently raped by soldiers, sometimes by Kovac, who allegedly sold some women to other soldiers. For these acts, Kovac was charged with crimes against humanity (enslavement and rape, Counts 61 and 62).<sup>108</sup>

*Kunarac.* On July 13, 1998, the OTP amended the initial Foča indictment to bring isolated charges<sup>109</sup> against Dragoljub Kunarac.<sup>110</sup> While using much of the language

<sup>107</sup> If sexual violence is charged as genocide only in connection with other crimes of physical violence, an implied assumption may be that sexual violence alone does not amount to genocide. It is also important to recognize that reproductive crimes may be separate from and in addition to other crimes. There is no indication that any distinction was made in the charges regarding the woman who lost her ability to reproduce; yet reproductive crimes deserve additional treatment and charges. A similar argument can be made regarding victims who become pregnant, bear children or who lose an existing pregnancy as a result of rape. Diseases and other injuries should be considered aggravating factors. See generally ASKIN, *supra* note 27.

<sup>108</sup> It is unclear why Kovac was not additionally charged with violations of the laws or customs of war and with grave breaches here. Similarly to the previous charge of enslavement, this charge was brought for a situation where women were held for sexual pleasure or personal gratification, not for a military or political purpose. Manual labor may also be a condition that was considered.

<sup>109</sup> Many of the same factual allegations were asserted against Kunarac in the original Foča indictment, but the actual charges against him were erroneously limited to four counts (Counts 40–43).

<sup>110</sup> On March 9, 1998, Kunarac pleaded guilty to rape as a crime against humanity. He pleaded not guilty to three other charges. Before the week was out, however, Kunarac's guilty plea would be rejected by the Tribunal, saying he did not fully understand the gravity of the charge against him, which carries a maximum sentence of life imprisonment. Jacqueline Pietsch, *Bosnian Serb rapist to appear before UN war crimes court, again*, Agence France-Presse, Mar. 13, 1998, available in 1998 WL 2240666; *War Crimes Panel Rejects Serb's Plea*, L.A. TIMES, Mar. 13, 1998, at A4; *Indictment of torture upheld against Bosnian Serb war crimes suspect*, Agence France-Presse, Mar. 13, 1998, available in 1998 WL 2240984. The Tribunal was reacting in part to the Erdemović debacle. After pleading



of the Foča charges, the Kunarac indictment<sup>111</sup> delivers new allegations and adds charges. It alleges that he, and soldiers under his command, had “unfettered access” to detention centers, including Partizan, where “physical and psychological torture, including sexual assault,” was common (paras. 1.5, 1.9). The indictment asserts that “a pattern of sexual assaults commenced. Armed soldiers . . . took the women from Partizan to houses, apartments or hotels for the purpose of sexual assault and rape” (para. 1.6). After their release, some detainees finally received medical care; many suffered permanent gynecological injury and all the women who had been subjected to sexual assault “suffered psychological and emotional harm; some remain traumatised” (para. 1.8).<sup>112</sup> For the varied forms of rape and other forms of sexual violence committed both by Kunarac personally and by persons under his authority, the twenty-one-count indictment against him brings charges of crimes against humanity (torture, rape, enslavement) and violations of the laws or customs of war (torture, rape, outrages upon personal dignity). Perhaps the most significant difference between the Kunarac indictment and the original Foča indictment is that charges of grave breaches were eliminated<sup>113</sup> and violations of Article 4 of Additional Protocol II were added to the violations of the laws or customs of war. The inclusion of Additional Protocol II is an important improvement both in this indictment and in the development of the Tribunal’s jurisprudence.

Once again, however, charges of genocide were not brought, even though the indictment makes allegations such as that Kunarac had personally told one woman he raped that she “would now give birth to Serb babies” (para. 6.1) and that, while three of his soldiers raped another woman, Kunarac “humiliated the witness by saying that they (the soldiers) would never know whose son this was” (para. 8.1). As in the Foča indictment, much of the sexual violence alleged in the Kunarac indictment could readily be construed as falling within the definition of genocide, including by imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group, and causing serious bodily or mental harm.

### *Rwandan Tribunal Indictments*

The Rwandan Tribunal is primarily concerned with prosecuting crimes committed during an internal armed conflict, whereas the Yugoslav Tribunal has focused principally on prosecuting crimes committed mainly, but not exclusively, during an international armed conflict. Nonetheless, as Judge McDonald, President of the ICTY, persuasively

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guilty to crimes against humanity and being sentenced by the trial chamber to 10 years’ imprisonment, the accused appealed. On October 7, 1997, the appeals chamber ruled that Erdemović’s guilty plea was not fully informed, and that he should be given an opportunity to replead. On January 14, 1998, Erdemović pleaded guilty to war crimes. Because war crimes are not considered as crimes against humanity, on March 5, 1998, Trial Chamber II-ter sentenced Erdemović to five years’ imprisonment. See ICTY Web site, *supra* note 12. For additional discussion of *Erdemović*, see Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, *supra* p. 57.

<sup>111</sup> See *Gagović*, as amended, *supra* note 13.

<sup>112</sup> The “trauma” language holds additional significance because the *Kunarac* case has been assigned to Trial Chamber II, consisting of the same judges as sat on the *Furundžija* case, discussed in text at notes 64–90. See *Prosecutor v. Gagović*, Order of the President Assigning a Case to a Trial Chamber (Mar. 5, 1998).

<sup>113</sup> This elimination is a reaction to the *Tadić* appeals chamber decision on jurisdiction, *supra* note 3, para. 71, in which the majority ruled that grave breaches apply only to international armed conflicts and only when committed against persons or property protected by the Geneva Conventions. The *Tadić* judgment is up on appeal, and it is unfortunate that the OTP is conceding its loss before the appeals chamber rules on crucial aspects of the decision. For an excellent analysis and summary of the primary consequences of the jurisdictional decisions on grave breaches, see Gabrielle Kirk McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War*, MIL. L. REV., June 1998, at 30.

argues, "the dichotomy that characterizes international humanitarian law—whether the conflict is international or internal—is untenable at the end of the twentieth century."<sup>114</sup> Although only two indictments in the ICTR have brought charges for gender-based crimes, after the precedent-shattering *Akayesu* judgment, more charges for sexual violence will likely be forthcoming. It is important for international humanitarian law to eradicate the unnecessary and inappropriate distinctions between the characterizations of international and noninternational armed conflicts and especially to provide protections to all civilian victims of wartime violence.

*Nyiramasuhuko and Ntahobali.* The indictment against Pauline Nyiramasuhuko and Arsene Ntahobali<sup>115</sup> charges them with genocide, complicity in genocide, crimes against humanity, and serious violations of common Article 3 and Protocol II. Ntahobali, a store manager, was jointly charged with his mother, Nyiramasuhuko, who at the time of the events referred to in the indictment was Minister of Women's Development and Family Welfare<sup>116</sup> and a prominent political figure (paras. 1–2.2., 3.6).

The indictment alleges that Nyiramasuhuko and Ntahobali established a roadblock near their home in Butare. They controlled this roadblock, and used it to identify, kidnap and kill members of the Tutsi population (para. 3.8), often forcing them to undress before being led to their deaths (para. 3.10). Ntahobali was also accused of "scur[ing] the Prefecture of Butare seeking Tutsi victims," whom he kidnapped and then handed over to be murdered (para. 3.11). In addition, Ntahobali allegedly "participated in the . . . raping of Tutsi women" (para. 3.12). According to Count 5, Nyiramasuhuko and Ntahobali "did cause outrages to the personal dignity, in particular humiliating and degrading treatment, by forcing [Tutsi women] to publicly undress, and thereby committing serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto." According to Count 6, the rapes Ntahobali committed were "part of a widespread or systematic attack on a civilian population on political, ethnic or racial grounds," constituting crimes against humanity. Count 7 alleges that, by committing rape, he caused "outrages to the personal dignity, in particular humiliating and degrading treatment" of these people, a serious violation of common Article 3 and Protocol II.

#### CONCLUSION

While gender-based crimes were largely ignored during the war crimes trials held in Nuremberg and Tokyo after World War II, crimes of sexual violence are being charged in the Yugoslav and Rwandan Tribunals as violations of the laws or customs of war, genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of common Article 3 of the 1949 Geneva Conventions and of the 1977 Additional Protocols. These charges represent significant progress for the heretofore inadequate international law on gender-based crimes. Many efforts of the OTP have been rewarded in convictions in both the ICTY and the ICTR on these bases.

Much remains to be done. Victims and witnesses need to be ensured adequate protection and support. The Tribunals must guarantee that the violent, gendered and

<sup>114</sup> McDonald, *supra* note 113, at 34–35.

<sup>115</sup> *Supra* note 21.

<sup>116</sup> In a 1997 edition of *Ubutabera*, the headline states: *Pauline Nyiramasuhuko is the First Woman Who Appeared Before an International Criminal Court.* See *UBUTABERA* (Independent Newsletter on the International Criminal Tribunal for Rwanda, Arusha), Sept. 8, 1997. She pleaded not guilty. It is not surprising that the first woman indicted for war crimes held a position of power within the government. It is nonetheless ironic and disturbing that this position of authority was as Minister of Women's Development and Family Welfare.

sexual nature of the crimes is not lost in broad, vague catchall phrases used in treaties and the respective statutes. Sentences must be commensurate with the gravity of the crime, reflecting the fact that crimes of sexual violence are as grave as other crimes of violence. One hopes that the precedents set by these Tribunals will have a significant impact on gender-based wartime violence, which is commonly inflicted on women in particular, and has previously been ignored in postwar remedial actions. These precedents should influence future trials, most notably those before the international criminal court, which will have jurisdiction over war crimes, crimes against humanity, genocide and aggression. Precedents must be strong and protective, and the language used in relevant treaties, statutes, indictments and judgments identifying the crimes and their nature must be appropriate and specific.

There is great need for an international treaty that directly addresses the treatment of women during periods of international and internal armed conflict, and that definitively criminalizes gender-based violence. All forms of such violence, including sexual violence, must be rigorously prohibited. More women need to participate in the process of prescribing and adjudicating the laws of armed conflict. Substantial progress has been made in recent years, but formidable obstacles remain before crimes that are directed exclusively or disproportionately against women and girls will be given the same attention as other crimes of violence in these contexts. Particular credit for the progress made goes to the OTP for creative and varied indictments that allow the prosecution of these various crimes. The few cases that have reached the judgment phase have vindicated these efforts. Nevertheless, the task is still daunting, and it will take significant social and legal reconstruction before gender-based crimes obtain parity with other international crimes.

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# BYPASSING THE SECURITY COUNCIL: AMBIGUOUS AUTHORIZATIONS TO USE FORCE, CEASE-FIRES AND THE IRAQI INSPECTION REGIME

By Jules Lobel and Michael Ratner\*

## INTRODUCTION

In January and February 1998, various United States officials, including the President, asserted that unless Iraq permitted unconditional access to international weapons inspections, it would face a military attack. The attack was not to be, in Secretary of State Madeleine Albright's words, "a pinprick," but a "significant" military campaign.<sup>1</sup> U.S. officials, citing United Nations Security Council resolutions, insisted that the United States had the authority for the contemplated attack. Representatives of other permanent members of the Security Council believed otherwise; that no resolution of the Council authorized U.S. armed action without its approval.<sup>2</sup> In late February, UN Secretary-General Kofi Annan traveled to Baghdad and returned with a memorandum of understanding regarding inspections signed by himself and the Iraqi Deputy Prime Minister. On March 2, 1998, the Security Council, in Resolution 1154, unanimously endorsed this memorandum of understanding.<sup>3</sup>

In the March 2 meeting, no country asserted that Resolution 1154 authorized the unilateral use of force, and a majority stated that additional Council authorization would be necessary before force could be used.<sup>4</sup> Only after that meeting did U.S. officials claim otherwise; Ambassador Bill Richardson said the UN vote was a "green light" to attack Iraq if President Clinton should decide that Iraq was not living up to the agreement.<sup>5</sup> This assertion in the face of the Security Council's pointed refusal to grant such authority views the Council as a source of the authority to use force, but not as an instrument for limiting its use. With at least one notable exception,<sup>6</sup> however, the United States did not claim to be entitled to use force without the Council's authorization to compel Iraqi compliance with the UN inspection obligations. Rather, U.S. and British officials argued that Resolution 678 of 1990, which empowered the United States and other states to use force against Iraq, still governed and continued to provide authority to punish Iraq for cease-fire violations.<sup>7</sup> This position assumed that Resolution 678's authorization to use

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<sup>1</sup> See Jim Wolf, *U.S. Won't Seek Saudi Sites for Iraqi Raids, Albright Says Air Strikes Could Begin Within Weeks*, BOSTON GLOBE, Feb. 7, 1998, at A1.

<sup>2</sup> See Christopher Wren, *Standoff With Iraq: The Law; UN Resolutions Allow Attack on the Likelihood of Iraq*, N.Y. TIMES, Feb. 5, 1998, at A6; John F. Harris & John M. Goshko, *Decision to Strike Iraq Nears; Clinton Advisors Lean Toward Back to Force Compliance with UN*, WASH. POST, Jan. 24, 1998, at A1.

<sup>3</sup> SC Res. 1154 (Mar. 2, 1998), reprinted in 37 ILM 503 (1998).

<sup>4</sup> See UN Doc. S/PV.3858, at 14, 17 (1998).

<sup>5</sup> See *U.S. Doesn't Mince Words With Iraq*, AP, Mar. 3, 1998, available in LEXIS, News Library, AP File.

<sup>6</sup> U.S. officials were initially cautious about Annan's agreement with Saddam Hussein and Secretary of State Madeleine Albright stated that if "we don't like" Annan's agreement, "we will pursue our national interest." See Dan Morgan, *Administration Weighs Steps in Case UN-Iraq Deal Doesn't Satisfy U.S.*, WASH. POST, Feb. 25, 1998, at A15.

<sup>7</sup> SC Res. 678 (Nov. 29, 1990), reprinted in 29 ILM 1565 (1990). See Undersecretary of State Thomas Pickering, *USA Foreign Press News Briefing*, Federal News Service, Mar. 3, 1998, available in LEXIS, News Library, Fednew File at "material breach would mean that the prohibition on the use of force, which arose as a result of the cease-fire, was no longer in effect").

force remained valid, albeit temporarily suspended—a loaded weapon in the hands of any member nation to use whenever it determined Iraq to be in material breach of the cease-fire. The refusal of the United States to accept limitations on its power by the Security Council thus depended on creatively interpreting the Council's resolutions to accord authority, despite the contrary positions of a majority of its members.

The U.S. and British claim highlights an important problem regarding the Security Council's method of authorizing individual member states or regional organizations to use force on behalf of the United Nations. This "contracting out" mode leaves individual states with wide discretion to use ambiguous, open-textured resolutions to exercise control over the initiation, conduct and termination of hostilities. Such states may seek to apply resolutions by the Security Council in conflict with its aims and objectives or the view of many of its members, as occurred in the 1998 Iraqi inspection crisis. This crisis thus raises questions regarding (1) whether the Security Council has authorized the use of force; (2) how the scope and extent of an authorization are determined; and (3) whether the authorization has terminated.

We argue that two fundamental values underpinning the United Nations Charter—that peaceful means be used to resolve disputes and that force be used in the interest and under the control of the international community and not individual countries—require that the Security Council retain strict control over the initiation, duration and objectives of the use of force in international relations. To ensure that UN-authorized uses of force comport with those two intertwined values, this article argues for three rules derived from Article 2(4) of the Charter: (1) explicit and not implicit Security Council authorization is necessary before a nation may use force that does not derive from the right to self-defense under Article 51; (2) authorizations should clearly articulate and limit the objectives for which force may be employed, and ambiguous authorizations should be narrowly construed; and (3) the authorization to use force should cease with the establishment of a permanent cease-fire unless explicitly extended by the Security Council.

The questions raised by the Iraqi inspection crisis of 1998 are likely to arise in the future.<sup>8</sup> The claim of the U.S. Government to an ongoing UN authorization to use force against Iraq to enforce the cease-fire agreement has resurfaced often over the past seven years and is unlikely to be withdrawn. Moreover, the tendency to bypass the requirement for explicit Security Council authorization, in favor of more ambiguous sources of international authority, will probably escalate in coming years. The recent controversy over NATO's threat to intervene militarily in Kosovo raises similar issues as to the requirement for explicit authorization.<sup>9</sup>

<sup>8</sup> Unfortunately, our prediction that the United States and the United Kingdom would continue to assert the right to use force against Iraq without Security Council authorization proved to be accurate. In December 1998, as this article was in its final stages of editing for publication, the United States and the United Kingdom launched air strikes against Iraq, claiming that Iraq had not complied with its inspection obligations. The legal arguments made by the two states in support of their use of force, and the counterarguments presented by countries opposing the attacks were identical to those presented by the contending sides in February 1998 and discussed in this article. As of this writing, the United States and Britain have ceased the air bombardment but are suggesting that it may continue early in 1999. The December air strikes will be evaluated in a short postscript; all references to the Iraqi inspection crisis in the article refer to the events of February and March 1998.

<sup>9</sup> U.S. officials have argued that the mere invocation of Charter Chapter VII with regard to the Kosovo situation is sufficient to authorize a resort to force. See John M. Goshko, *U.S., Allies Inch Closer to Kosovo Intervention; UN Council to Vote on Key Resolution*, WASH. POST, Sept. 23, 1998, at A21. The *New York Times* reported that on Kosovo, "as on Iraq, there is a recurring disagreement over how much authority individual nations or regional organizations have to take military action without the clear support of the Security Council." Barbara Crossette, *Security Council Tells Serbs to Stop Kosovo Offensive*, N.Y. TIMES, Sept. 24, 1998, at A1.

## I. THE GENERAL PRINCIPLES UNDERLYING UN AUTHORIZATIONS OF FORCE

The UN Charter established an international organization in which states, pursuant to Article 43, would make armed forces available to the Security Council to counteract threats to the peace. This has not occurred. In its stead, the Security Council has authorized member states to use force, in essence franchising UN members to act in the Organization's behalf. The Security Council has authorized member states to use force in Korea in 1950, against Iraq in 1990, and in Somalia, Haiti, Rwanda and Bosnia in the early 1990s.

Smaller, nonaligned states, as well as some scholars, have voiced concern over the legitimacy of Security Council authorizations to individual states to use force. They argue that the resulting situation allows the powerful states to control decisions whether to employ force, how to use it, and when to terminate hostilities. These determinations are made without accountability and control by the Security Council.<sup>10</sup> Despite these concerns, the authorization method is likely to dominate UN practice for the foreseeable future. While we believe that the long-term interest of world peace and security supports revitalizing Article 43, the United States, among others, appears unwilling to submit command and control over its forces to anything more than perfunctory UN supervision. In this context, the United Nations becomes only an authorizing body, ceding control of the actual military operations to individual states.

Problems with the authorization method surface in several related areas. First, states might use force on the basis of actions by the Security Council that could impliedly be interpreted to authorize force, but where its intent to do so was unclear. For example, in 1991 the United Kingdom, the United States and France used force to provide humanitarian aid to the Kurds and to establish safe havens and no-fly zones in northern Iraq partly on the basis of ambiguous authority in Resolution 688. That resolution made no mention of military force, nor was it intended to authorize such force. The Economic Community of West African States (ECOWAS) intervened militarily in Liberia in 1990 without any explicit authorization by the Security Council, although the Council later did issue statements and a resolution approving ECOWAS's actions.

Second, states acting under the authorization of the Council might interpret their mandate to be broader than it had intended. The potential for conflict is most pronounced where the Council has delegated wide authority to a coalition of states to address a major problem, such as the Iraqi invasion of Kuwait. For example, Resolution 678, while motivated by the goal of expelling Iraq from Kuwait, also contains broad language authorizing force "to restore international peace and security in the area." That language could mean virtually anything, depending on how one defines "peace and security" and "area."<sup>11</sup> During the Persian Gulf war, a dispute arose as to whether the

<sup>10</sup> See John Quigley, *The "Privatization" of Security Council Enforcement Action: A Threat to Multilateralism*, 17 MICH. J. INT'L L. 249 (1996); Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AJIL 516, 525-28 (1991); Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT'L L.J. 341, 341 (1995); Stephen Lewis, *A Promise Betrayed*, 8 WORLD POL'Y J. 539 (1991). See statement of January 25, 1991, by Malaysia indicating that its support for Resolution 678 in the Security Council was premised on a "continuing central role of the United Nations." Malaysia worried that the coalition members were drawing a "blank cheque from the Security Council resolution" and wanted to see "greater accountability of the actions by participating forces." Malaysia claimed that its concerns were being expressed by many UN members. UN Doc. S/22149 (1991), reprinted in IRAQ AND KUWAIT: THE HOSTILITIES AND THEIR AFTERMATH 358 (Marc Weller ed., 1993) [hereinafter IRAQ AND KUWAIT].

<sup>11</sup> Professor Henkin has noted the difficulty of defining threats to international peace and security. He has pointed out that the term "threat to international peace and security . . . is not capable of legal definition, but only of political determination by a political body." Such imprecision requires Security Council authorization to use force to combat threats to peace and security. Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 575 (1997).

elimination of Iraq's war-making power, a goal asserted by some of the leaders of the coalition states, was authorized by Resolution 678.<sup>12</sup> The dispute over interpretation of Resolution 678 has continued to fester. In the February 1998 crisis, the United States and the United Kingdom interpreted the broad language "to restore international peace and security" as authorizing the use of force to ensure that Iraq destroyed its biological and chemical weapons—a condition not imposed upon Iraq until after the gulf war was over. Similar questions and disputes over Security Council authorizations to use force arose during the Korean War and the Bosnian and Somalian conflicts.

Furthermore, when the authorizations are not temporally limited, questions arise about their termination. As the Iraqi inspection crisis illustrates, the states acting under Security Council authorization might want to continue to employ force after the basic goal of the mission has been achieved. Conflicts often continue to simmer after hostilities have ended. A key question is whether a permanent cease-fire or other definitive end to hostilities terminates Security Council authorizations to use force.

To resolve these issues, two interrelated principles underlying the Charter should be considered. The first is that force be used in the interest of the international community, not individual states. That community interest is furthered by the centrality accorded to the Security Council's control over the offensive use of force. This centrality is compromised by sundering the authorization process from the enforcement mechanism, by which enforcement is delegated to individual states or a coalition of states. Such separation results in a strong potential for powerful states to use UN authorizations to serve their own national interests rather than the interests of the international community as defined by the United Nations. The decentralization and delegation of the actual use of force is likely to predominate for many years, necessitating stricter Security Council control over such authorizations.

To uphold the principles of the Charter, the Security Council must retain clear control over authorizations to use force (with the exception of force pursuant to Article 51), even if political and military considerations require that it delegate military command to individual nations. The difficulties of controlling the scope and extent of the use of force when its employment is delegated to individual states require, at a minimum, strict control by the Council over the initiation and termination of hostilities. Such control is achieved by the application of normative rules stipulating clear Council approval of non-Article 51 uses of force and termination of that authorization when a permanent cease-fire or other definitive end to the hostilities is realized.

Controlling the military tactics and objectives of the contractee nations will obviously be a difficult task for the Security Council as long as the contracting-out model prevails. Authorization to engage in a large-scale, long-term military operation will often be viewed as requiring that contractees be granted broad discretion so that they can effectively operate and cope with unpredictable military situations. Yet even in this situation, which the Security Council obviously cannot micromanage, it ought to limit the mandate to ensure that the contractee states employ force to secure the UN objectives and not their own. Moreover, overly broad and ambiguous authorizations should be interpreted narrowly to ensure that the Council retains appropriate control over the military operation it spawns.<sup>13</sup> As part III below demonstrates, such a rule would not unduly interfere with the military requirements of the contracting-out model.

<sup>12</sup> See Bruce Russett & James S. Sutterlin, *The UN in a New World Order*, FOREIGN AFF., Spring 1991, at 69, 77.

<sup>13</sup> There are two important questions that can arise when interpreting ambiguous language in an authorizing resolution. The first, dealt with by this article, concerns a basic policy decision: what are the objectives for which the Security Council has authorized the use of force? We argue that the Council must clearly specify its objectives. Language that broadly authorizes a range of unspecified goals ought to be narrowly interpreted to

Security Council control over authorization of the use of force is required not merely to ensure that states resort to force for international rather than national ends. It is also required to fulfill a second constitutive principle of the United Nations, stated in the Charter's stirring preamble: "to save succeeding generations from the scourge of war." A preeminent purpose of the Charter, set forth in Article 1, is "to bring about by peaceful means . . . settlement of international disputes . . . which might lead to a breach of the peace." While Article 1 also articulates as a purpose of the United Nations "to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression," it is nonetheless true "that the United Nations was founded to be attentive first and foremost to peaceful settlement of international disputes and to rely on the military instrument of policy only as an extreme last resort."<sup>14</sup>

The Charter presumption that peaceful means will be used to settle international disputes is a substantive principle that confers responsibility on the Security Council not only to control uses of force, but also to use force solely as a last resort and to minimize its extent. The general Charter principle that strongly promotes the peaceful resolution of disputes entails the following: (1) that implicit authorizations of force be disfavored; (2) that explicit authorizations be interpreted narrowly to prevent contractee states from formulating the objectives so as to exceed the Council's clear intentions; and (3) that authorizations terminate when the goals of the operation are met and a permanent cease-fire established.

The Charter requirement of explicit authorization by the Security Council for the use of force is supported by Articles 33 and 42. The provision in Article 42 that the Council

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ensure Council control over the pursuit of the stated objectives and to prevent an escalation of fighting to achieve goals not clearly intended.

The second issue is whether an authorizing resolution supports the military tactics employed by the contractee states. For example, while the resolution might clearly articulate the Council's goal, disputes might arise over the extent of violence used by the authorized states. In this context, it could be argued that the Charter's preference for peaceful settlement of disputes requires a narrow reading of the authorizing resolution, not merely as to the ends of the operation, but as to the means to be employed. This article does not address that question.

However, we do offer some tentative comments on that second issue. First, by way of example, issues as to the appropriate ends and means arose in the coalition's bombing of Iraq during the gulf war. Some nations criticized the bombing campaign as directed at destroying Iraq's military and industrial capacity—an objective they claimed was not intended by Resolution 678. Had the United States and the United Kingdom argued that the bombing campaign was justified by the broad language "restoring international peace and security," we would urge that this language should be interpreted narrowly, and only supported the aim clearly intended by the Council, forcing the Iraqi withdrawal from Kuwait.

However, the United States and Britain argued that the bombing was directed at forcing Iraq from Kuwait. That claim could be evaluated from the perspective of two sources of law. The first is not based on the authorizing resolution but, rather, deals with limitations imposed by the general laws of warfare, particularly rules regarding proportionality. Here, the main question is which rules apply? One position would apply the customary laws of war and whatever treaty norms the contractee states happen to have accepted. A competing view would hold that customary law and those multilateral treaties negotiated under UN auspices and ratified by a majority of UN members should apply.

Second, the Resolution 678 authorization of "all necessary means" to force Iraq out of Kuwait could be read narrowly to limit the coalition's military tactics to those directly related to forcing an Iraqi withdrawal. This would not include bombing bridges and buildings far from the theater of military operations. Our reading of the preference for peaceful settlement in the Charter leads us to sympathize with this view. Nonetheless, such a narrow reading is certain to be rejected by many contractee states and scholars on the ground that it unduly interferes with military effectiveness in ensuring that the Security Council's objectives are met. We might like to see such a rule applied, but the practical and theoretical difficulties of implementation in the current situation make it difficult. Consequently, we argue for greater Council control and a narrow interpretation of the strategic objectives for which force can be used, rather than of the military means used to achieve those objectives. Of course, there can be a very hazy line between tactics and objectives—and, therefore, at times it will be difficult to implement the rule we suggest. See generally part III *infra*.

<sup>14</sup> Weston, *supra* note 10, at 526 n.60; see also *id.* at 527, 533; Richard A. Falk, *The United Nations and the Rule of Law*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 611, 634 (1994).



may authorize force only after determining that nonlethal sanctions under Article 41 would be or are inadequate suggests that open-ended or vague delegations of authority are inappropriate. Certainly, a rule that the Council must determine that nonmilitary measures are inadequate would also mean that it must clearly determine that military measures are necessary. Both rules flow from the principle underlying Article 42: that armed force should be used only as a last resort.<sup>15</sup> Embedded in the substantive principle that force be used only as a last resort is a procedural requirement that the deliberative body authorizing force do so clearly and specifically. The obligation under Article 33 that the parties to any dispute must first seek a resolution by peaceful means further supports the Article 41 principle. Requiring clear Security Council authorization acts as a brake on the use of force by the international community: it is a procedural condition designed to fulfill the Charter's substantive goal of ensuring that force be employed only when absolutely necessary.

The requirement of explicit authorization can be met by language evincing a clear intent on the part of the Security Council. Diplomatic considerations may require that the text of a resolution not use the term "force" explicitly. In 1990 the United States apparently wanted an explicit reference to the use of military force against Iraq, but owing to Soviet objections the Council substituted the language "all necessary means."<sup>16</sup> In that case, however, it was clear that the Council's intent was to authorize the use of force. While the Council's language may occasionally bow to diplomatic necessity, a core requirement of the Charter would be transformed if individual nations were permitted to use force when the Council's language and intent are both ambiguous.

Second, although the Charter clearly empowers the Security Council to employ force to combat threats to or breaches of the peace, Council authorizations of force must be interpreted in light of the Charter's goal of minimizing violence in the international community. It should not be presumed that the Security Council has authorized the greatest amount of violence that might be inferred from a broad authorization. The opposite presumption should apply: while force can be used to carry out the specific objectives in the authorizing resolution, ambiguous or broad language in the resolution that might be read to encompass force for objectives not clearly intended by the Council should be interpreted narrowly. For example, Resolution 678 clearly authorized force to oust Iraq from Kuwait, but the broad provision on restoring international peace and security ought to be read in the context of that purpose. It should not be interpreted to authorize an escalation of the fighting that would remove the Government of Iraq or enforce weapons inspections.

Finally, the Charter's preference for settling disputes by peaceful means and the Article 2(4) prohibition on the use of nondefensive force require that a UN authorization of force terminate when a permanent cease-fire is negotiated. Armed responses to breaches of cease-fire agreements cannot be made by individual states; a new Security Council authorization must be adopted.

These principles ought to be in the interest of the permanent members of the Security Council, as well as the smaller states that constitute a majority of the United Nations. If contractee states refuse to accept clear limitations on the scope and duration of their delegated authority, construe unclear Security Council language to imply authority to use force where no such authority was intended, or stretch the terms of their contracted authority beyond what most Council members support, the result may be increased reluctance to contract out the use of force. The consequence of such a conflict in the

<sup>15</sup> See Frederic L. Kirgis, *The Security Council's First Fifty Years*, 89 AJIL 506, 522 (1995).

<sup>16</sup> See Quigley, *supra* note 10, at: 262 (citing BOB WOODWARD, *THE COMMANDERS* 334 (1991)).

current geopolitical circumstances would be to undermine the Security Council's role in multilateral collective security and probably increase the unilateral uses of force by militarily powerful nations.

## II. THE REQUIREMENT OF CLEAR SECURITY COUNCIL AUTHORIZATION OF FORCE

Disputes have arisen over whether a state or group of states claiming to be acting pursuant to implied or ambiguous Security Council authorization are acting lawfully. Both the Iraqi inspection dispute of early 1998 and the looming Kosovo crisis later that year raised questions whether Security Council ambiguity, acquiescence, approving statements or even silence suffices to provide authorization for the use of force. As a textual matter, the Charter requires the Security Council to approve affirmatively of nondefensive uses of force. Acquiescence does not suffice. To infer Council authorization either from silence, or from the obscure interstices of Council resolutions, undermines this Charter mandate.

Nonetheless, governments and scholars have argued with regard to various international incidents involving the use of force that it was lawfully employed pursuant to implied authorization by the Security Council. These claims of implied authorizations have been disputed within the international community. However, such claims may well multiply in the future as interventionist pressures increase and the Council resists acting directly. The post-Cold War environment militates against forceful unilateral intervention, increasing pressure on states to find at least some form of multilateral authority to justify their forceful action.

### *Claims of Implied Authorizations of Force*

The general political pressure to find implied authorization in Security Council acquiescence or ambivalence rests on construing the purpose of the United Nations to maintain international peace and security as requiring forceful action to remove threats to the peace. Rogue states that flout Council resolutions or otherwise threaten the peace, or states that commit gross human rights violations against their citizens, ought to be penalized. Thus, in the absence of effective UN sanctions, world order requires that individual states or regional organizations provide an effective remedy. As one commentator notes, "Article 2(4) was never an independent ethical imperative of pacifism" but can be understood only in the context of an organization premised on the "indispensability of the use of force to maintain community order."<sup>17</sup>

The inability of the Security Council to authorize force when some believe it to be clearly needed propels the search for implied authorizations. Some argue that diplomatic and political reality may preclude the Council from publicly authorizing actions that its members privately desire or at least would accept.<sup>18</sup> When a group of states act to enforce a Security Council resolution that the Council itself is unwilling to enforce—as

<sup>17</sup> W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AJIL 642, 642 (1984).

<sup>18</sup> See Anthony D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AJIL 584, 586 (1983) ("There is a subtle interplay of politics and acquiescence that renders any demand for 'unambiguous authorization' unrealistic."); see also Jane E. Stromseth, *Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 100 (Lori F. Dænnrosch ed., 1993) (ambiguity of Resolution 688, which the allies relied on for legal support of their military operation to provide safe havens, was viewed as both necessity and virtue by allowing China and other nations to acquiesce in the action without authorizing it de jure); Barbara Crossette, *UN Rebuffs U.S. on Threat to Iraq if it Breaks Pact*, N.Y. TIMES, Mar. 3, 1998, at A1 (State Department spokesman James Rubin calling final wording of Resolution 1154 "not as relevant as . . . private discussions").

was arguably the case in the recent Iraqi inspection crisis—the argument can be made that those states are not acting unilaterally, but on behalf of a clearly articulated community mandate.

Political necessity finds a home in legal realist theory. That theory eschews or tempers formal textual rules, in favor of the law's operational code, which can be derived only from a contextual and empirical analysis of how elites actually behave. From this perspective, arguments that an implied Security Council authorization exists and is sufficient, reflect the elite's willingness to tolerate certain forceful action by individual states, even if such behavior conflicts with the formal rules embodied in the UN Charter.

An examination of six international incidents<sup>19</sup> in which implied authorization has been suggested cautions against this approach because of the difficulty of determining when an action has been impliedly authorized, the uncertainty in the law and the potential for abuse.

(1) In 1961 India seized Goa from Portugal, arguing, *inter alia*, that it was enforcing UN resolutions against colonialism. Professor Quincy Wright rejected this reasoning, which he considered to be a claim based upon an implied authorization.<sup>20</sup> While a majority of the Security Council opposed India's claim,<sup>21</sup> many newly independent states in Africa, as well as the Soviet Union, believed that colonization was such an evil that the use of force against it should be tolerated. This political view led to the United Nations' *de facto* acquiescence in India's takeover of Goa, which might be perceived as an implicit, after-the-fact authorization. Such an implied authorization loosens the restraints on the use of force; it encourages states to use force when they believe their actions will be tolerated for political reasons by a majority of states.

(2) In 1962 the United States, admitting that it was not explicit, argued that it had implied Security Council authorization to interdict Soviet ships en route to Cuba.<sup>22</sup> The key factors supporting this alleged implied authorization were that the Council, by general consent, had not voted on the Soviet resolution disapproving the U.S. action and had encouraged a negotiated settlement.<sup>23</sup>

The U.S. case for implied authorization seems strained. In fact, the Council had also refrained from acting on a U.S. draft resolution that would have expressed approval of the U.S. action.<sup>24</sup> Moreover, if failure to adopt a resolution condemning the use of force is dispositive, what if the Council votes to condemn by a wide margin, but the resolution is vetoed by a permanent member? At a minimum, the analysis calls for a deeper

<sup>19</sup> For the argument that the study of key actors' responses to a critical event or incident is an important methodology for understanding whether formal laws have genuine significance, see *INTERNATIONAL INCIDENTS, THE LAW THAT COUNTS IN WORLD POLITICS* (W. Michael Reisman & Andrew R. Willard eds., 1988).

<sup>20</sup> Quincy Wright, *The Goa Incident*, 56 *AJIL* 617, 629 (1962).

<sup>21</sup> A draft resolution by the three permanent Western members and Turkey on behalf of Portugal's complaint of Indian aggression called for a cease-fire and Indian withdrawal. Seven Council members supported the resolution, which was vetoed by the Soviet Union. The Council also failed to adopt a resolution supported by four members to reject the Portuguese complaint. In these circumstances, Council silence suggests implied disapproval and not authorization. *Id.* at 628.

<sup>22</sup> See Abram Chayes, *Law and the Quarantine of Cuba*, 41 *FOREIGN AFF.* 550, 556 (1963):

[T]he debates in the Security Council in the case of the Dominican Republic revealed a widespread readiness to conclude that the requirement of "authorization" does not impart prior approval, but would be satisfied by subsequent action of the Council, or even by a mere "taking note" of the acts of the regional organization.

See also Leonard Meeker, *Defensive Quarantine and the Law*, 57 *AJIL* 515, 522 (1963) (paralysis of the Council and UN constitutional evolution undermine requirement of explicit authorization).

<sup>23</sup> See Chayes, *supra* note 22, at 556; Meeker, *supra* note 22, at 522.

<sup>24</sup> See Michael Akehurst, *Enforcement Action by Regional Agencies, With Special Reference to the Organization of American States*, 42 *BRIT. Y.B. INT'L L.* 175, 217 (1967).

understanding of why the resolution was not enacted. But such an analysis will often be impossible, since we can never know dispositively what motivated each Security Council member.<sup>25</sup>

(3) Professor Anthony D'Amato's claim that the Israeli 1981 air strike against the Iraq nuclear reactor was an example of implicit Security Council approval of an armed action takes the 1962 U.S. argument to its extreme.<sup>26</sup> In this case, the Security Council was not silent but "[s]trongly condemn[ed]" the air strike.<sup>27</sup> Yet for D'Amato the condemnation was pro forma because it contained no sanctions against Israel. D'Amato relies on this failure to claim that "it is often politically expedient for the community to condemn a forceful initiative in explicit terms, yet to approve of it in fact by stopping short of reprisals against the initiator."<sup>28</sup>

D'Amato's argument that symbolic condemnation illustrates that the international community politically tolerates the act may express a certain reality in international affairs.<sup>29</sup> But to take the additional step and argue that explicit disapproval constitutes implied consent renders the concept of authorization indeterminate and highly speculative. Are human rights resolutions that denounce abuses but impose no sanctions merely expressions of implied approval of those abuses? Who determines whether a particular Security Council action or series of actions is strong enough to constitute genuine disapproval?

(4) The one time that the Security Council may very well have implicitly authorized a use of force was in Liberia in 1990, although it was after the fact. In August 1990, armed forces from five member states of ECOWAS intervened in Liberia to attempt to stop a civil war. ECOWAS had no explicit Security Council authorization to do so, although subsequent Council actions tacitly accepted and expressed praise for the intervention.<sup>30</sup> This appears to be the only case in which the Security Council's implicit approval was uncontested. The Liberian example, however, still presents the danger that it will encourage regional organizations to use force first in the hope of inducing later Security Council approval.

(5) The 1991 effort by the United States, the United Kingdom and France to provide safe havens to the Kurdish refugees in northern Iraq and to enforce no-fly zones in both northern and southern Iraq has been justified on the ground that these actions were implicitly authorized by UN resolutions.<sup>31</sup> Those legal claims were disputed by Secretary-General Javier Pérez de Cuéllar, who concluded that a foreign military presence on Iraqi territory required either the express authorization of the Security Council or Iraqi consent. While many UN members acquiesced in the safe-haven operation, some raised concerns about the absence of explicit Council endorsement; furthermore, both Soviet

<sup>25</sup> Professor Akehurst claims that the U.S. attempt to equate authorization with acquiescence contradicted U.S. policy prior to 1960 and that the United States apparently abandoned its creative definition of authorization in the 1965 Dominican dispute, although his evidence for the latter position seems inconclusive. See *id.* at 219. Apparently, most states rejected the U.S. position on implied authorization. See David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in ENFORCING RESTRAINT, *supra* note 18, at 157, 187.

<sup>26</sup> D'Amato, *supra* note 18; Anthony D'Amato, *Israel's Air Strike Against the Osiraq Reactor: A Retrospective*, 10 TUL. INT'L & COMP. L.J. 259, 262-63 (1996).

<sup>27</sup> SC Res. 487, UN SCOR, 36th Sess., Res. & Dec., at 10, UN Doc. S/INF/37 (1981).

<sup>28</sup> D'Amato, *supra* note 18, at 586; see also D'Amato, *supra* note 26, at 262 (resolution can only be seen as covert support for Israel's air strike).

<sup>29</sup> See also W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXT AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 101-13 (1992).

<sup>30</sup> See Wippman, *supra* note 25, at 165, 185-86; Lori F. Damrosch, *Concluding Reflections*, in ENFORCING RESTRAINT, *supra* note 18, at 348, 357 ("authorization" could arguably have been inferred within the meaning of Charter Article 53 from acquiescence or from a previous cautiously worded statement on the Council's behalf).

<sup>31</sup> See Stromseth, *supra* note 18, at 77.

and Chinese officials opposed deploying either UN forces or foreign states' military forces to protect Iraqi civilians without their government's consent.<sup>32</sup> Baghdad ultimately agreed to the deployment of five hundred armed UN guards on Iraqi territory to protect UN humanitarian workers.

The establishment of the no-fly zones in northern and southern Iraq was based on similar theories of implied authorization and acquiescence. In August 1992, the proposed southern no-fly zone was "widely criticized" in the United Nations as going beyond any legal mandate and the Non-Aligned Group said that any move to attack Iraqi planes would not receive Security Council backing.<sup>33</sup> After the last of the January 1993 raids on Baghdad, the UN Legal Department endorsed a chorus of criticism of the raids, stating that "the Security Council made no provision for enforcing the bans on Iraqi warplanes."<sup>34</sup> When, in September 1996, the United States conducted military strikes to enforce an extended southern no-fly zone, it earned only lukewarm support from its allies and criticism from Russia and most of the members of the Security Council.<sup>35</sup>

(6) Finally, the present U.S. claim to the forcible enforcement of the inspection regime also relies on implied authorization. Undersecretary of State and former UN Ambassador Thomas Pickering adopted the U.S. position taken in 1962 regarding Cuba by arguing that Resolution 1154 does not preclude the unilateral use of force. Pickering argues that a key factor in interpreting that resolution is that the United States was able to persuade other Security Council members not to include language explicitly requiring it to return to the Council to obtain authorization for force.<sup>36</sup> But the failure to adopt a resolution opposing U.S. action cannot be deemed dispositive when any such resolution would have been fruitless in the face of the U.S. and UK veto power. Still, the Council did the next best thing: it adopted a resolution that did not provide the United States with the authority it sought and the members stated their understanding that the resolution was intended to preclude any such authority.

In sum, this admittedly brief survey of state and Security Council practice on implied authorization arguments suggests three propositions: (1) that while there have been occasional attempts to justify uses of force under the theory of implied authorizations, those incidents do not amount to a "systematic, unbroken practice"—to use Justice Frankfurter's phrase from the *Youngstown Sheet and Tube* case<sup>37</sup>—that warrants a "gloss" on the Charter's requirement of explicit Security Council approval; (2) that most of these claims of implied authorization have been strongly contested; and, most important, (3) that the difficulty of determining whether an authorization has been implied and the resulting uncertainty for world order counsel caution in adopting any such reading of Security Council actions. There are others who might view the incidents we have discussed through a different prism. However, the difficulty of divining and attributing motivations to state actors and of interpreting unrecorded or informal Security Council discussions suggests that a world order that permits implied Council authorizations to

<sup>32</sup> See *id.* at 90.

<sup>33</sup> Alan Philips, *Allies deny plan to dismember Iraq*, DAILY TELEGRAPH (London), Aug. 22, 1992, at 9.

<sup>34</sup> See *France Says U.S. Raid Exceeded UN Resolutions*, SAN DIEGO UNION-TRIB., Jan. 21, 1993, at A1.

<sup>35</sup> See Alain E. Boileau, *To the Suburbs of Baghdad: Clinton's Extension of the Southern Iraqi No-Fly Zone*, 3 ILSA J. INT'L & COMP. L. 875, 890 (1997).

<sup>36</sup> See Pickering, *supra* note 7, at 5.

<sup>37</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 599, 610–11 (1952) (Frankfurter, J., concurring).

use of force would depend not on the clearly held expectations of states but, rather, on the nuanced interpretation of ambiguous state actions. That seems to be a dubious way to implement a basic international norm.

### *Explicit Security Council Authorization and Peace and World Order*

The UN Charter requirement that nondefensive uses of force be explicitly authorized by the Security Council comports with both the purposes of the Charter and the needs of a peaceful and stable world public order. The maintenance of collective security was and remains an important goal of the Charter. However, another key purpose, perhaps even the overriding one, was to develop an international system that, while not pacifist, strongly favors resolution of disputes by peaceful means. That presumption of peaceful means requires that ambiguity be interpreted against warfare, a mandate that supports a rule that Security Council authorizations to use force must be clear and unambiguous. Article 42 reflects the presumption of peaceful means by specifying that the Council may decide to authorize the use of force only after determining that other measures are insufficient.

Implied Security Council authorization to use force is often inferred from the Council's condemnation of a nation's action as a threat to the peace.<sup>38</sup> But making that inference is unwarranted; it contradicts the Charter's requirement that the Security Council must determine both that a threat to the peace exists and that peaceful means cannot resolve the situation. In many cases, as in the Iraqi and Kosovo crises of 1998, the Council will have declared a threat to the peace but will not have affirmed the need for military action. In those situations, the requirement of explicit Security Council approval of uses of force reflects the substantive value that force not be used too hastily to resolve international disputes. The more nations understand that the authority to use force can be difficult to obtain, the greater their efforts will be to find peaceful, creative negotiated solutions to problems.

A world order that would allow nations to use force unilaterally under the guise of creative or disputed interpretations of vague language in Security Council resolutions or by the Council's failure to act would undermine Article 2(4). Powerful member states could use that theory to justify the use of force in their own national interest. The potential havoc wreaked by such a legal regime counsels restraint—restraint to be found in the legal requirement that Security Council delegations of authority to use force be both clear and narrowly construed.

If the Security Council is dysfunctional or paralyzed by the exercise of the veto, as arguably occurred during the Cold War, the case for implied authorization might be stronger. However, Council practice since the Cold War simply does not support any great need for a flexible reinterpretation of the Charter to support the actual behavior of states. Five times in the past eight years the Security Council has clearly authorized the use of force to address threats to world peace.<sup>39</sup>

<sup>38</sup> For example, in both the Iraqi and the Kosovo crises, the Council's determinations that the respective Iraqi and Serb actions posed Chapter VII threats to the peace were claimed by the United States to permit the use of force without the need for explicit Council authorization.

<sup>39</sup> See, e.g., SC Res. 678, *supra* note 7 (authorizing use of "all necessary means" to liberate Kuwait); SC Res. 794, UN SCOR, 47th Sess., Res. & Dec., at 63, UN Doc. S/INF/48 (1992) (authorizing "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia"); SC Res. 940, UN SCOR, 49th Sess., Res. & Dec., at 51, UN Doc. S/INF/50 (1994) (authorizing member states "to form a multinational force . . . and . . . to use all necessary means to facilitate the departure from Haiti of the military leadership"); SC Res. 929, *id.* at 10 (authorizing France to use "all necessary means" to protect civilians in Rwanda); and SC Res. 770, UN SCOR, 47th Sess., Res. & Dec., *supra*, at 24, and 816, *id.*, 48th Sess., Res. & Dec., at 1, UN Doc. S/INF/49 (1993) (authorizing states to take "all measures necessary" to facilitate delivery of

At times, such an authorization is hard to obtain, but that is the way things ought to work. That China, India, Russia and occasionally France balk at what they consider an inappropriate use of force is not cause for concern; rather, it should lead observers to conclude that the Council retains some vitality as a restraint on war making. It was established to be not merely a forceful initiator of collective enforcement measures, but also a restraining influence on the unwarranted or hasty rush to forcible solutions. While the situation may have changed from that prevailing in the early 1990s and authorization may be harder to obtain, that fact does not warrant bypassing the Security Council. Indeed, the recent controversies regarding Iraq afford hope that the Council will play its contemplated role of authorizing force only as a last resort. World order requires a Security Council that can find the proper balance between authorizing the collective use of force when there is both a compelling need and no peaceful alternative, and not succumbing to economic and political pressure by powerful nations<sup>40</sup> seeking a multi-lateral cover for what is in essence the unilateral use of force.

In the long-term interest of world order, it is imperative that the Security Council be actively engaged in determining whether force ought to be employed by the international community.<sup>41</sup> A rule that allows acquiescence to constitute authorization and that substitutes ambiguity for clear intent would encourage the Security Council to avoid deciding when the use of force is necessary and appropriate. Acquiescence begets more acquiescence, and once a custom of allowing nations to take forceful action under claims based on ambiguous authority is established, it will develop a momentum of its own. For example, the failure to provide explicit legal authority for the ECOWAS intervention suggests that the Security Council, which seemed unanimously to approve of the action, nevertheless chose to avoid its responsibility to authorize it explicitly. Allowing cases like the ECOWAS intervention to legitimate implied authorization will merely encourage the Security Council to avoid taking stands on difficult issues of when to use force.<sup>42</sup>

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humanitarian assistance and enforce no-fly zone in Bosnia). The examples of the use of force subsequent to the gulf war against Iraq are not uncontroverted and are dealt with in part III *infra*.

<sup>40</sup> See, e.g., Weston, *supra* note 10, at 523-24 (describing pressures brought to bear on Council members prior to the vote on Resolution 678).

<sup>41</sup> The U.S. constitutional experience with the doctrine of implied authorization of force favors rejection of such a doctrine on the international level. Just as the United States sought to bypass the cumbersome and difficult process of securing Security Council authorization to use force against Iraq by inferring extant Council authority, so post-World War II U.S. Presidents have often avoided seeking explicit congressional authorization and instead construed implied authority to use force from legislative enactments such as appropriations statutes. See *War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, International Security, and Science of the House Comm. on Foreign Affairs*, 99th Cong., 2d Sess. 5, 10, 29 (1986) (testimony of State Department Legal Adviser Abraham D. Sofaer). See also MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 100-02 (1990); *War Powers Legislation: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 103, 587, 650 (1971). Legislative acquiescence in presidential unilateral war making has also been construed by the Executive as constituting implied authorization. The result of all this has been a general decline in the congressional role on the initiation of hostilities.

<sup>42</sup> The question of institutional responsibility fundamentally distinguishes authorization by acquiescence from the problem of Article 27(3) voting. Charter Article 27(3) provides that Security Council action requires "the concurring votes of the permanent members." Despite the apparent clarity of this language, the Organization's consistent practice has been to permit passage of a resolution despite the absence of or abstention by permanent members. See Myres S. McDougal & Richard Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 YALE L.J. 258, 278 (1951); Constantin A. Stavropoulos, *The Practice of Voluntary Abstentions by Permanent Members of the Security Council Under Article 27, Paragraph 3, of the Charter of the United Nations*, 61 AJIL 737, 742 (1967). Both Chayes and Meeker argued during the Cuban missile crisis that, just as political necessity called for treating abstention as meeting the requirement of concurring votes, so acquiescence by the Security Council could constitute the required authorization. See Meeker, *supra* note 22, at 522; Chayes, *supra* note 22, at 556.

Apart from the fact that the custom on the meaning of Article 27(3) is based on the *travaux préparatoires* and a continuous and generally accepted practice that does not exist for implied Security Council authorizations of force, see Akehurst, *supra* note 24, at 217, a clear difference exists between abstention by a permanent

In addition to promoting the peaceful resolution of disputes and the Security Council's assumption of responsibility, requiring a clear Council authorization is necessary to ensure that the world community affirmatively supports the use of force and does not merely acquiesce in the actions of a powerful state. Allowing ambiguity in the authorization of force enables powerful states to pick and choose which Council resolutions to enforce and more generally to act unilaterally under the guise of multilateral authority. Ambiguity is often the handmaiden of great-power assertiveness. James Madison's insight that government cannot be based on the proposition that men are angels may be appropriately applied to the behavior of states. It is certainly rare for a nation to be motivated not primarily by its own national interest, but in the community's interest. The history of humanitarian intervention is replete with invocations of humanitarian goals by strong powers or multilateral coalitions to justify their own geopolitical interests.<sup>43</sup>

Of course, situations will arise in which most UN members will want the United States or some other state to be able to use force, and China or some other state or bloc of states may be unalterably opposed. But in the extreme case of an ongoing genocide for which the Security Council will not authorize force, perhaps the formal law ought to be violated to achieve the higher goal of saving thousands or millions of lives. In these circumstances, the acting state would have to weigh the risk of universal condemnation and sanctions. Thus, it would have to make a convincing case that the military action is not based on a mere pretext and will be effective and proportionate. Silence by the Security Council might then reflect a community consensus that the legal requirement for its authorization ought to give way to the moral imperative. That extreme case is unusual, however, and certainly does not resemble the recent Iraqi inspection crisis. While the accusation that Iraq is still seeking to develop weapons of mass destruction alleges a serious threat to the peace, no one claims either that Iraq is currently employing such weapons to kill thousands of people, or that it has the capability, opportunity or intention of imminently doing so.<sup>44</sup> Only claims of this magnitude might fit the extreme cases that would possibly justify using force in violation of international law. In dealing with those cases, it is

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member and acquiescence by the Council as a body. Such abstention presumptively means that despite its concerns or objection to the resolution, the permanent member is willing to allow the measure to pass; no such intent can be presumptively imputed to failure by the Council to condemn a particular use of force. *See id.* Most important, while Security Council members have no responsibility to vote yes or no on a resolution and ought not to be forced to do so, the Council does have a responsibility to act or refuse to act as a body regarding a breach of the peace. Not permitting permanent members' abstention or absence to act as a veto fosters open responsibility on their part, *see* McDougal & Gardner, *supra*, at 286; allowing Council acquiescence to act as an authorization fosters abdication.

<sup>43</sup> *See* Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AJIL 275 (1973). Franck and Rodley examine the historical record of humanitarian interventions and conclude that "[i]n very few, if any, instances has the right [to humanitarian intervention] been asserted under circumstances that appear more humanitarian than self-interested and power-seeking." *Id.* at 290. "[T]he kind of unilateral military intervention which has occurred in the past is usually not to be encouraged . . . those kinds of intervention which it would be desirable to encourage have for reasons of self-interest almost never occurred in the past . . ." *Id.* at 305. *See also* Falk, *supra* note 10 (summarizing prior U.S. interventions); Marc Trachtenberg, *Intervention in Historical Perspective*, in *EMERGING NORMS OF JUSTIFIED INTERVENTION* 15 (Laura W. Eed & Carl Kaysen eds., 1993); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AJIL 645, 650 (1984); Confu Channel (Merits), 1949 ICJ REP. 4, 35 (Apr. 9) (noting that a right of intervention by force "has, in the past, given rise to most serious abuses . . . [F]rom the nature of things, it would be reserved for the most powerful States . . .").

<sup>44</sup> That Russia, France, China, a majority of the Security Council, other key members of the 1991 coalition such as Egypt, Syria and Pakistan, many of our Middle East allies such as Turkey, and what undoubtedly was a majority of member states of the United Nations opposed military action demonstrates that the international community did not view the threat posed by Iraq as warranting the use of force. *See* Bruce W. Nelan, *Selling the War Badly*, TIME, Mar. 2, 1998, at 26; Robin Wright, *What a Difference 7 Years Makes in the Gulf*, L.A. TIMES, Feb. 15, 1998, at A10. Usually reliable allies such as Egypt and Pakistan specially attended the Council meeting on Resolution 1154 and strongly advised against the use of force.



preferable to recognize that on the rare occasions when a nation is solely motivated by humane considerations, it must violate the law to save humanity, than to use those cases to dilute the prohibition on the unilateral use of force as a whole.

The observations of Thomas Franck and Nigel Rodley as to the desirability of creating exceptions to the prohibition on unilateral humanitarian intervention apply with equal force to interventions that rely on implied or ambiguous Security Council authorization:

In exceptional circumstances . . . a large power may indeed go selflessly to the rescue of a foreign people facing oppression. But surely no general law is needed to cover such actions. . . . [I]n human experience it has proven wiser to outlaw absolutely conduct which, in practical experience, is almost invariably harmful, rather than to try to provide general exceptions for rare cases. Cannibalism, given its history and man's propensities, is simply outlawed, while provision is made to mitigate the effect of this law on men adrift in a lifeboat. The hortatory, norm-building effect of a total ban is greater than that of a qualified prohibition, especially at that stage of its legal life when the norm is still struggling for general recognition. This is a question of balance. So long as the preponderant predictable applications of a proposed exception to the prohibition on unilateral force are socially undesirable—and the historical record so indicates—the exception should not be made.<sup>45</sup>

Some scholars and officials argue that UN diplomacy is at times aided by a unilateral threat by powerful states to use force and cite the U.S. threat against Iraq as having been necessary to end the 1998 inspection crisis.<sup>46</sup> But even if the U.S. threat did play a role,<sup>47</sup> that merely suggests that illegal action can at times have useful consequences, at least in the short run. The rule of law requires that we sometimes sacrifice using force to punish people or regimes that are evil so as to secure a more peaceful domestic and world order.

International law, the United Nations and multilateralism require that a nation must accept the limits imposed by law as well as the power endowed by it. That the world community and the Security Council are occasionally more reluctant to use force than our policy makers would like is a restraint imposed by the international legal system. Unless we are prepared to concede that all nations have a right to use force to enforce Security Council resolutions—a result that the United States would not favor—we ought to accept the Charter's legal regime with the clear recognition that it sometimes requires us to forgo policy options we may prefer. Multilateralism obliges nation-states to define their national interest in a manner that does not conflict with the international community's view of its interest. Multilateralism is thus tied to respect for international law. Multilateralism is not a tactic; it is an end that furthers respect for international law.<sup>48</sup>

### III. DRAFTING AND INTERPRETING AUTHORIZATIONS TO USE FORCE

The basic principle that the use of force in international relations other than in the exercise of self-defense requires an express authorization by the UN Security Council leaves open the question of how explicit authorizations should be drafted and interpreted. The requirement of explicit authorization implies the corollary that implemen-

<sup>45</sup> Franck & Rodley, *supra* note 43, at 290–91.

<sup>46</sup> See Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction*, 92 AJIL 724 (1998).

<sup>47</sup> Secretary-General Annan and French President Chirac both recognized the useful role of the American and British threat to use force in diplomatically ending this crisis. We are not in a position to dispute the accuracy of Annan's observation, but note how often threats of force have failed to secure Hussein's compliance with UN resolutions in the past, most notably in January 1991 and January 1993, when actual force had to be used. We suspect that Annan's personal approach succeeded where the attitude of American diplomats backed by force would not have.

<sup>48</sup> See Madeleine Albright, *The United States and the United Nations: Confrontation or Consensus?* VITAL SPEECHES OF THE DAY, NO. 12,354, Apr. 1, 1995, for the view that "multilateralism is a means, not an end."

tion of express authorizations that contain ambiguous language should be confined to objectives that were clearly intended by the Security Council.

The Persian Gulf war and the difficulties attendant on the lengthy process of ensuring Iraqi compliance with the cease-fire agreement highlight the tension between the Security Council's explicit issuance of a broad mandate to states to use force to achieve the Organization's objectives and the pressure those states exerted to interpret that mandate in their own national interests. In November 1990, when Resolution 678 authorized member states to use force to oust Iraq from Kuwait, few, if any, of the Council members could have contemplated that the resolution would authorize the bombing of Iraq to secure compliance with an inspection regime—a requirement imposed only after the war's end and the restoration of Kuwaiti sovereignty. Thus, the recent Iraqi inspection crisis raises an important question regarding Security Council authorizations to use force: how should such resolutions be framed and interpreted so as to achieve the collective-security purposes of the United Nations while limiting the scope and extent of the violence authorized?

### *Area and the Gulf War Authorizations*

The United Nations experience during the Korean War illustrates the difficulties that arise from broad authorizing language. Resolution 83 of June 27, 1950, authorized "members of the United Nations to furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."<sup>49</sup> The Security Council's discussion yields little evidence regarding the meaning of "restore international peace and security in the area."<sup>50</sup> Several days after the resolution was adopted, Secretary of State Acheson stated that U.S. actions taken "pursuant to the Security Council resolution" were "solely for the purpose of restoring the Republic of Korea to its status prior to the invasion from the north and of reestablishing the peace broken by that invasion."<sup>51</sup> However, by the end of September 1950, as a result of the successful allied landing in Inchon, which routed the North Koreans, the United States and its allies faced the question whether to pursue the retreating North Koreans into the North and seek their total destruction. That issue had a legal component: was such action authorized by Resolution 83 or did it require new UN authorization?

Initially, President Truman apparently believed that crossing the parallel required a UN decision. However, shortly thereafter, the Department of State asserted that Resolution 83 provided the requisite authority to pursue the retreating North Koreans.<sup>52</sup> The U.S. ambassador to the United Nations argued that "[f]aithful adherence to the United Nations objective of restoring international peace and security in the area counsels the taking of appropriate steps to eliminate the power and ability of the North Korean aggressor to launch future attacks."<sup>53</sup> The Indian Government and several other states believed that further specific authorization was legally necessary, although the majority of UN members did not oppose the U.S. position.<sup>54</sup> Nonetheless, the United States did submit the issue to the General Assembly, which approved the crossing of the 38th

<sup>49</sup> SC Res. 83, UN SCOR, 5th Sess., Res. & Dec., at 4, UN Doc. S/INF/5/Rev.1 (1950).

<sup>50</sup> The phrase tracks Article 39 of the Charter.

<sup>51</sup> See LELAND M. GOODRICH, *KOREA: A STUDY OF U.S. POLICY IN THE UNITED NATIONS* 198 (1956).

<sup>52</sup> *Id.* at 127.

<sup>53</sup> 23 DEP'T ST. BULL. 579 (1950).

<sup>54</sup> See I. F. STONE, *THE HIDDEN HISTORY OF THE KOREAN WAR* 133 (1952).

parallel on October 7, 1950, after South Korean forces under General MacArthur's command were already in North Korean territory.<sup>55</sup>

The legal significance of the U.S. decision to seek additional UN authorization is unclear. The U.S. position was that such authorization was unnecessary because military operations required broad and flexible legal authority to deal with changing situations, authority that had been granted by Resolution 83. As a textual matter, the U.S. argument was strong, particularly because the North Koreans had not indicated any desire for a cease-fire and had suggested that they might strike to the south again.<sup>56</sup> Nevertheless, the fact that for policy reasons the United States sought and obtained new authorization is some evidence of state practice that contractee states do seek further authorization when the objectives of the action change.<sup>57</sup>

The Korean example illustrates that where contractee states seek to escalate warfare in a manner that projects a major change in the political or military objectives that the Security Council intended to authorize—in Korea from repelling the North Korean attack on the South to unifying the country—they should seek new authorization and not rely on ambiguous language in the original resolution. Maintaining the control of the Council over the warfare it authorizes requires that, although operational command may be delegated to states, major policy changes in objectives, or major military actions that seriously threaten to widen the war, must be authorized by the United Nations. A change in objectives poses grave risks of widening the war, a risk that eventuated in Korea. Because of those risks, Security Council resolutions must be interpreted to authorize what was clearly intended, not what can conceivably be justified. The Korean case demonstrates that when broad political agreement exists, the necessary authorization can be obtained fairly quickly without compromising the military situation.

Moreover, when the authorized states seek to widen a war to achieve new political and military objectives, the Charter's presumption in favor of peaceful resolution of disputes requires the Council seriously to consider whether a negotiated settlement can be reached. Since the invocation of new objectives often means that the original objectives have by and large been accomplished—as happened in Korea—a request for new authorization would force the United Nations to thoroughly assess the prospects for a peaceful settlement. Unfortunately, the pressure to pursue the military option to total victory propelled Washington to ignore and frustrate the efforts of Secretary-General Trygve Lie and others to achieve a settlement in October 1950, efforts that might have prevented the loss of hundreds of thousands of lives.<sup>58</sup>

As was the case in Korea, the gulf war mandate of Resolution 678 authorized states to use all necessary means to "restore international peace and security in the area." From a purely textual perspective, that authorization seems to have few, if any, limits. "Area" is undefined and could mean Iraq or the entire Middle East.<sup>59</sup> "Restoring

<sup>55</sup> GA Res. 376 (V), UN GAOR, 5th Sess., Supp. No. 20, at 9, UN Doc. A/1775 (1950). The United States turned to the General Assembly because the Soviet delegation had returned to the Security Council and would have vetoed any extension of the UN objectives. The Assembly's resolution did not explicitly state that UN forces were authorized to enter North Korea, but everyone involved understood that such was its intent. See D. W. BOWETT, UNITED NATIONS FORCES 43 (1964); TRYGVE LIE, IN THE CAUSE OF PEACE 345 (1954).

<sup>56</sup> See LIE, *supra* note 55, at 345.

<sup>57</sup> In a similar sense, President Bush's decision to seek congressional approval of the gulf war was claimed to be political, and not legally necessary, but many have viewed it as evidence that the Executive must seek authorization for military operations of substantial magnitude.

<sup>58</sup> See, e.g., LIE, *supra* note 55, at 345 (describing his peace proposal, which he believed had met with considerable interest in October 1950).

<sup>59</sup> A legal opinion of the UN Deputy Legal Counsel, UN Doc. S/AC.25/1991/Note 15 (1991), held that the word "area" in the prior Resolution 665 on Iraq was not defined geographically and that it was therefore necessary to interpret it in accordance with the context and the object and purpose of the text. See Helmut

international peace and security" could mean occupying Iraq, removing Saddam Hussein from power, or bombing Iraq's military/industrial capacity.<sup>60</sup> Officially, the United States never made those broad claims during the war. Indeed, shortly after it ended, U.S. officials testified that Resolution 678 had not granted open-ended authority to occupy Iraq, and that the military incursions into Iraq during the war were authorized only because they were "pursuant to the liberation of Kuwait, which was called for in the UN resolution."<sup>61</sup> Moreover, in response to accusations that the coalition's bombing campaign stretched the boundaries of the Security Council's authorization, many states, including those fighting in the Gulf War, declared that their sole purpose was to liberate Kuwait.<sup>62</sup> Thus, if Resolution 678 is still extant, it should be interpreted narrowly and consistently with its object and purpose. The clear intent of the Security Council in 1990 was to provide authority to oust Iraq from Kuwait, not to grant a blanket license for any member state to attack Iraq to enforce inspections mandated after the war.<sup>63</sup>

Limiting the legitimate objectives of UN-authorized uses of force does not unduly affect military efficacy, since it does not restrict the military means or tactics that can be employed but, rather, the political goals for which force can be utilized. Authorized states would retain the discretion to determine the military means needed to achieve the goals clearly articulated by the Security Council. They would not, however, be empowered by ambiguous language to escalate the fighting to achieve objectives not clearly mandated. To adopt the contrary position would essentially be to eviscerate Security Council control over authorized uses of force.

Subsequent to the war, the United States and the United Kingdom interpreted Resolution 678 as authorizing force to achieve compliance with the cease-fire. While incorrect but textually plausible, this interpretation illustrates the problems raised by authorizations that do not specify precise objectives.<sup>64</sup> In our view, the essentially boilerplate language "to restore international peace and security" added no clear meaning or objectives to either the 1950 Korean or the 1990 Persian Gulf authorization. It was

Friedensschuß, *Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council*, 5 EUR. J. INT'L L. 492, 499 n.21 (1994).

<sup>60</sup> See Eugene V. Rostow, *United What? Enforcement Action or Collective Self-Defense?* 85 AJIL 506, 516 (1991) (allied occupation might be deemed necessary); Editorial, *Legitimate Aims of the Allies*, INDEPENDENT (London), JAN. 23, 1991, at 18 (removing Hussein from power required).

<sup>61</sup> Testimony of Assistant Secretary of State John Kelley and Assistant Secretary of Defense Henry Rowen before the Europe and Middle East Subcomm. of the House Comm. on Foreign Affairs, Federal News Service, JAN. 26, 1991, at 151, available in LEXIS, News Library, Fednew File.

<sup>62</sup> See Statements of Sir David Hannay (UK), UN Doc. S/PV.2977 (Part II) (closed) (1991), reprinted in IRAQ AND KUWAIT, *supra* note 10, at 39; Mr. Vorontsov (USSR), *id.* at 45; Mr. Wilenski (Australia), *id.* at 51; Mr. Razali (Malaysia), *id.* at 55.

<sup>63</sup> The use of the term "restore" is further textual evidence of this specific intent; restoration means returning to the status quo prior to the Iraqi invasion of Kuwait. Virtually all of the Security Council members stated in voting for Resolution 678 that they were doing so, in the words of Mr. Hurd, the UK representative, to demand "the reversal of the aggression—namely full compliance with previous resolutions." See UN Doc. S/PV.2963, at 82 (1990). As Mr. Shevardnadze of the USSR noted, "The purpose of the resolution we have just adopted is to put an end to the aggression and make it clear to the world that aggression cannot be rewarded." *Id.* at 94–95.

<sup>64</sup> An authorizing resolution could contain ambiguous language for several reasons. The first is poor drafting or insufficient attention to particular language, a problem fairly easily cured. More substantively, ambiguous language could reflect compromises in the negotiating process designed to allow Security Council members subsequently to argue for more or less expansive interpretations. We believe that in those situations, the Charter presumptively favors the less expansive view, which could be overcome only by clear intent to the contrary. Division in the Council over objectives suggests that further debate and authorization are necessary prior to the use of force.

unnecessary and invited difficulties. The legitimate objectives of both wars did not require such open-ended language. They ought to have been limited to the recreation of the status quo ante.

### *Post-Persian Gulf War Authorizations*

Many states were concerned about the minimal role that the Security Council played during the gulf war and the perceived lack of accountability to the Organization of the states that took action pursuant to the authorization. This concern led to attempts by members of the Council to rectify these problems in the authorizations to use force adopted after the gulf war. Some of these authorizations in Bosnia, Somalia, Haiti and Rwanda imposed more extensive consulting requirements. Other provisions focused on providing a unified command and control under UN auspices, or at least on authorizing the Secretary-General to exercise more command over military operations.<sup>65</sup> In Bosnia, a dispute between the United States and the Secretary-General arose as to whether air strikes against Bosnian Serb targets had to be authorized by the Secretary-General and approved by the UN commander.<sup>66</sup> When most of its NATO allies supported the Secretary-General, the United States backed down and recognized UN authority. The Somalia authorizations accorded substantial authority to the Secretary-General as well.<sup>67</sup>

The authorizations since the gulf war have also focused on limiting the mandate granted by the Security Council. In both the Bosnia and the Somalia operations, the Security Council, instead of broadly mandating the use of force as in Resolutions 678 and 83, ratcheted up the level and more precisely delineated the purposes of force to be employed. In Bosnia, the Council enacted specific resolutions, first to authorize force to secure the delivery of humanitarian supplies, next to enforce the no-fly zone, and then to protect the safe havens.<sup>68</sup> In Somalia, the initial Resolution 794 authorized "the Secretary-General and Member States . . . to use all necessary means to establish . . . a secure environment for humanitarian relief operations."<sup>69</sup> That generally worded authorization was interpreted broadly by the Secretary-General, who supported the general disarming of the Somalia factions, and more narrowly by the United States. Security Council Resolution 814, adopted on March 26, 1993, over four months later, explicitly authorized the expansion of the mandate of UNOSOM, the UN force in Somalia.<sup>70</sup> After

<sup>65</sup> See Quigley, *supra* note 10, at 266–67.

<sup>66</sup> See Freudenschuß, *supra* note 59, at 510–11.

<sup>67</sup> Resolution 794 authorized "the Secretary-General and the Member States concerned to make the necessary arrangement for the unified command and control of the forces involved" in the Somalia operation. Resolution 814, expanding UNOSOM's role, and Resolution 837 both authorized the Secretary-General to oversee the use of force. Because of the attempts at unified command and control, the Somalia resolutions were unanimously approved by the Security Council. SC Res. 794, UN SCOR, 47th Sess., Res. & Dec., at 63, UN Doc. S/INF/48 (1992); SC Res. 814, UN SCOR, 48th Sess., Res. & Dec., at 80, UN Doc. S/INF/49 (1993); SC Res. 837, *id.* at 83, para. 5.

<sup>68</sup> On August 13, 1992, Resolution 770 was enacted, calling upon states to take all measures necessary to facilitate the delivery of humanitarian assistance to Sarajevo and other parts of Bosnia. While Britain, France and the United States stressed the narrowness of the authorization, India, Zimbabwe and China still objected to the lack of UN control over the operation and abstained. Almost two months later, the Council established a no-fly zone over Bosnia in Resolution 781, but refused to authorize force to enforce it. Not until March 3, 1993, did the Security Council in Resolution 816 authorize the enforcement of the flight ban and on June 4 adopt Resolution 836 to protect the safe havens. See Freudenschuß, *supra* note 59, at 503–09, for the history of these resolutions.

<sup>69</sup> SC Res. 794, *supra* note 67, para. 10.

<sup>70</sup> Nonetheless, controversy continued as to the scope of the UN mandate and an independent commission established by the Security Council to investigate the ambush of the peacekeeping forces accused the UN force of "overstepping" its mandate. See SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 235 (1996); Paul Lewis, *Report Faults Commanders of U.N. Forces in Somalia*, N.Y. TIMES, May 20, 1994, at A10. The Somalia case demonstrates that the problem of having commanders interpret their

the attacks against the UN troops by the forces of General Aidid, the Security Council explicitly authorized his arrest in Resolution 837. The Council and participating states did not rely on the arguably broad language of Resolution 794, but specifically authorized each escalation of force.

In addition, the Security Council has placed temporal limits on authorizations. France's authorization to intervene in Rwanda was limited to two months.<sup>71</sup> Resolution 940, which permitted member states to use all necessary means to facilitate the military leadership's departure from Haiti, also contained a more general grant of authority "to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement."<sup>72</sup> The broad mandate under this resolution could arguably have been interpreted to be virtually unlimited. To counteract this problem, Resolution 940 required that the Security Council, not the participating states, should determine when a stable and secure environment had been established and the multinational forces' functions terminated.<sup>73</sup> A termination provision was also included in Resolution 1031, which authorized NATO to use force to implement the Dayton Accords with respect to Bosnia. In that resolution the Council terminated all its prior authorizations in that regard and decided, "with a view to terminating the authorization granted" to the NATO force, to review it within one year to determine whether it should be continued.<sup>74</sup> In Somalia, the original authorization in Resolution 794 contained no time limit, but each subsequent resolution authorized UNOSOM II to use force for a limited period of time (usually about six months).<sup>75</sup> That authorization was periodically renewed until finally terminated on March 31, 1995.<sup>76</sup>

This admittedly brief survey suggests that substantive and temporal limitations on Security Council authorizations are possible; that relatively narrow authorizations are workable; and that contractee states can be required to seek new authorizations to undertake expanded uses of force. On the basis of experience in the Korean War, the Persian Gulf war and these later incidents, we suggest several guidelines regarding the promulgation and interpretation of resolutions authorizing the use of force.

First, resolutions should set forth clear, explicit and limited objectives. They should eschew clauses that would appear to grant nations a blank check to employ force to achieve potentially limitless objectives. In most cases, we believe it possible to achieve reasonable clarity of objectives and avoid indeterminate language such as "restore international peace and security." In some cases, it may prove necessary to use language such as "secure a stable environment." If, however, the objectives cannot be defined

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mandate too broadly is present even where the operation is directed by a UN commander under the supervision of the Secretary-General. The problem is considerably exacerbated, however, by the contracting-out model. See generally MURPHY, *supra*, at 241-42.

<sup>71</sup> SC Res. 929, *supra* note 39.

<sup>72</sup> Several governments objected to Resolution 940, criticizing, inter alia, the lack of a time frame for the proposed action (Mexico) and the similarity between its operative paragraph and Resolution 678 on the Gulf crisis (Brazil). UN Doc. S/PV.3413, at 5-9 (1994).

<sup>73</sup> SC Res. 940, *supra* note 39, para. 8. In Haiti, the United States defined its mission narrowly, to return Aristide to power and provide the Haitians with a short rebuilding time. In January 1995, the Security Council determined that a sufficiently stable and secure environment was in place to transfer authority to a UN peacekeeping force. See MURPHY, *supra* note 70, at 274.

<sup>74</sup> SC Res. 1031, paras. 19, 21 (Dec. 15, 1995), *reprinted in* 35 ILM 251 (1996).

<sup>75</sup> SC Res. 814, *supra* note 67, para. 6 (mandate for expanded UNOSOM authorized for an initial period through Oct. 31, 1993).

<sup>76</sup> SC Res. 954, UN SCOR, 49th Sess., Res. & Dec., *supra* note 39, at 59. For an excellent overview of the post-Persian Gulf war humanitarian interventions, see MURPHY, *supra* note 70, ch. 5.

clearly, the Council ought to examine whether authorizing the use of force is advisable and evaluate other mechanisms that would enable it to maintain some control over the operation.

Second, resolutions should be temporally limited, either by a renewable set time period or by a provision requiring the Security Council to determine whether the objective has been achieved. To avoid the possibility of a veto that would permit the authorization to remain in force, the Council might provide that it must approve such determinations by majority vote or supermajority, or require an affirmative vote in order to continue the authorization.<sup>77</sup>

Finally, authorizing resolutions should be interpreted narrowly both to minimize violence and to ensure that the Security Council supports the particular use of force. This guideline is consistent with the provisions on the use of force in the Charter, as well as its object and purpose. A liberal interpretation of such authorizations would not be consistent with the Charter.

Several objections could be made to the foregoing analysis. First, such limitations could be viewed as counterproductive, encouraging noncompliance by the nation being penalized by the Council. For example, the limits contained in post-Persian Gulf war authorizations were criticized by some as being too weak and ineffective. While imposing temporal and substantive limitations on the use of force could possibly hinder UN military operations, the alternative of granting contractee states virtually limitless discretion is more dangerous in that it provides no international check on potentially devastating military escalations.<sup>78</sup>

Second, it could be argued that these recent efforts by the Security Council to control the scope and extent of the uses of force add little to our understanding. In contrast to the Korean and gulf wars, they involved relatively small-scale operations in which the major powers were reluctant to employ force. Thus, in the Bosnia crisis, the Western states and Russia were cautious or opposed to the assertive use of force,<sup>79</sup> and often rejected draft resolutions proposed by the nonaligned members of the Security Council seeking broad authorizations.<sup>80</sup> Similarly, in Somalia the United States initially, and at various points thereafter, sought to narrow the objective for which force would be used, while the Secretary-General pushed to widen the mandate. In these situations, the major

<sup>77</sup> Several objections could be raised to this proposal. First, just as Congress cannot circumvent the presentment and bicameral provisions in the U.S. Constitution by providing for a legislative veto, *see* *INS v. Chadha*, 462 U.S. 919 (1983), so it could be argued that the Security Council cannot circumvent the Charter's grant of a veto power to the permanent members. However, the Charter, unlike the Constitution, is not premised on separation of powers and the proposed Council action would not be circumventing the power of another branch. Moreover, the rationale for providing the veto does not apply to situations of the "reverse veto." David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AJIL 552, 576 (1993). As Caron has persuasively argued, the possibility of modified voting clauses supports the objectives of the United Nations, enhances the legitimacy of Security Council decision making, and should be politically feasible. *Id.* at 584-87.

<sup>78</sup> Our claim is not that Security Council decisions regarding the use of force and its objectives are necessarily wiser than such decisions by individual nations. The Charter is not based on such a presumption. However, the Charter does embody the principles, first, that force should be employed in the interest of the international community and not in the national interest of particular states, and, second, that force should be used only as a last resort. The requirement that the Security Council control the use of force aids in ensuring that force is not used solely to promote national interest; and also acts, in the words of Thomas Jefferson written in the U.S. constitutional context, "to chain the dogs of war." 15 THE PAPERS OF THOMAS JEFFERSON 397 (Julian P. Boyd ed., 1958).

<sup>79</sup> *See* PHYLLIS BENNIS, *CALLING THE SHOTS* 140-49 (1996).

<sup>80</sup> For example, the Non-Aligned Group circulated a draft resolution in April 1993 that would have "authorized Member States, pursuant to Article 51, to provide all necessary assistance to the Government of Bosnia and Herzegovina to enable it to resist and defend the territory of the Republic of Bosnia and Herzegovina against Serbian attacks." The Non-Aligned Group generally criticized the narrow interpretations of the UN force's role in Bosnia. *See* Freudenschuß, *supra* note 59, at 508-09.

powers often willingly accepted temporal and substantive controls on the use of force, restrictions that would have been rejected in a major war in which a permanent member had substantial interests.

We would hope that the post-gulf war practices of calibrating and limiting objectives and imposing temporal limits and Security Council control would be transferable to a major conflict. Unfortunately, past experience and present reality do not make us sanguine about those prospects. More realistically, the momentum toward war, the assertion of national interest and the perceived necessity for military flexibility and power to counteract aggression might once again, as in the Korean and gulf wars, overwhelm other Charter values: Council control, minimizing authorized violence and pursuing peaceful settlement. For these reasons, the Security Council should place strong emphasis on maintaining control over the *initial* decision to authorize the use of force and insist that nations not resort to nondefensive uses absent a clear Council mandate.

#### IV. CEASE-FIRE AGREEMENTS AND SECURITY COUNCIL AUTHORIZATIONS OF FORCE

The prior two sections dealt with the initiation and contracting out of the use of force; this section concerns problems that occur in terminating contracted-out authorizations. As the Iraqi inspection crisis illustrates, states have claimed the authority to use force subsequent to a permanent cease-fire ending hostilities.

The basic Charter principles that we have outlined—peaceful resolution of disputes and Security Council control over the use of force—require that, even where there is no termination provision in the authorization to use force, that authority expires with a permanent cease-fire unless explicitly continued. Such authorization cannot be revived by the contractees unilaterally; it is for the Security Council to consider whether a breach of that cease-fire justifies a reauthorization of force.

##### *The Effect of the UN Charter*

Pre-Charter law permitted a party to a cease-fire to treat its serious violation as a material breach, entitling it to resume fighting.<sup>81</sup> The United States and the United Kingdom rely on this law to argue that Iraqi violations of the inspection regime established during the cease-fire revived the Resolution 678 authorization to use force. This view ignores the prohibition on the use of force under Article 2(4), which, properly understood, "changes a basic legal tenet of the traditional armistice."<sup>82</sup> Post-Charter law holds that UN-imposed cease-fires reaffirm the basic obligation of states to refrain from using force. Therefore, a violation of the cease-fire, even a material breach, is not a ground for the other party to revive hostilities, at least short of an armed attack giving rise to an Article 51 right of self-defense.<sup>83</sup> As one scholar writes, "Although terms of the armistice agreements dealing with important but collateral issues such as verification regimes or implementation mechanisms may fail, the overriding obligation not to resort to force as a means of dispute settlement is deemed severable and continues to be binding."<sup>84</sup>

Strong policy interests make it advisable that Security Council authorizations to use force be terminated by the establishment of a cease-fire unless explicitly and unambig-

<sup>81</sup> See Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, annexed Regulations, Art. 40, 36 Stat. 2277, 1 Bevans 631.

<sup>82</sup> David Morris, *From War to Peace: A Study of Cease-fire Agreements and the Evolving Role of the United Nations*, 36 *VA. J. INT'L L.* 802, 822-23 (1996).

<sup>83</sup> See Richard R. Baxter, *Armistices and Other Forms of Suspension of Hostilities*, 149 *RECUEIL DES COURS* 353, 355-85 (1976 I); Ernest A. Simon, *The Operation of the Korean Armistice Agreement*, *MIL. L. REV.*, Jan. 1970, at 105, 115-27; Morris, *supra* note 82, at 822, 897.

<sup>84</sup> Morris, *supra* note 82, at 822-23.



uously continued by the Council itself. The overall objectives of the Charter and the changes it has wrought in the law on the use of force mandate that disputes be settled by peaceful means, if at all possible. This suggests that the end of hostilities, however that is accomplished, reestablishes the Article 2(4) obligations on all states not to use force, including in implementing cease-fire provisions, and not to do so without a new Council authorization. For example, no one would seriously claim that member states of the UN command would have the authority to bomb North Korea pursuant to the 1950 authorization to use force if in 1999 North Korea flagrantly violated the 1953 armistice.

Moreover, that rule is especially necessary when the Security Council control consists of authorizing member states to use force, a more decentralized approach than envisioned by the Charter's framers. To permit authorizations to continue after a permanent cease-fire ends hostilities would allow individual states to use force indefinitely, a result that would undermine the Council's control<sup>85</sup>—particularly when the authorized states include a permanent member that could veto any Council resolution terminating the authorization. Every authorization to use force thus far has been at the behest of a permanent member of the Security Council. This trend is likely to continue. In such situations the potential use by that permanent member of what has been termed a "reverse veto" to block the Council from terminating an authorization that no longer enjoys the support of the international community undermines the Council's legitimacy and Charter-mandated control over the use of force.<sup>86</sup>

Indeed, the gulf war and its aftermath illustrate the problematic use of the veto threat to reverse the Charter's objective of peaceful settlement. In response to the peace initiatives pursued by the Soviet Union and other nations in the days before the coalition's ground attack, both the United States and the United Kingdom reportedly threatened to veto any resolution that would terminate the UN sanctions and the Resolution 678 authorization of force in return for an Iraqi pullout from Kuwait.<sup>87</sup> More recently, the possibility of a U.S. and UK veto undoubtedly lurked in the background in preventing the Security Council from explicitly stating that the Resolution 678 authorization had terminated and that a new resolution must be adopted before any member state could use force to enforce UN inspections in Iraq. Consequently, the better interpretation of the legal situation regarding the further use of force by member states after a permanent cease-fire has been reached is that a new Council authorization must be obtained. That view is consistent with the law and objectives of the Charter.

Certainly, the use of the veto threat to prevent the repeal of an authorization that the majority of the Council wants terminated could be addressed in other ways. As already discussed in part III, the initial authorization can set a time limit for the use of force or provide for its own termination by majority or supermajority vote of the Council,<sup>88</sup> or it can be narrowly drawn to ensure that force is used only for limited purposes. At times,

<sup>85</sup> The U.S. experience with broad legislative delegations of emergency power that did not terminate when the immediate crisis was over ought to make the international community wary of continuing authorizations to use force beyond the termination of hostilities. In the 1970s, Congress and the Executive both recognized that the failure to provide for the termination of broad emergency power had allowed the President to dangerously accumulate unchecked power. For example, the emergency that Truman declared in 1950 in the context of the Korean War continued for over 25 years and formed the legal basis for executive action having nothing to do with the original purpose of the emergency declaration. In response to the concerns over the authorization of emergency power of indefinite duration, Congress enacted the National Emergencies Act, terminating virtually all emergency authority based on the past declaration of emergency. See Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §1501 (1994)).

<sup>86</sup> See Caron, *supra* note 77, at 552, 576-84.

<sup>87</sup> *Id.* at 577, 583.

<sup>88</sup> See Caron, *supra* note 77, at 584-85, for an argument that the Security Council has the authority to take such action.

however, the Council will not be able to so limit the contractee's mandate because of strong contrary pressure from powerful states or the nature of the operation. Therefore, *at a minimum*, to ensure that Security Council authorizations do not continue in perpetuity, the approach we have argued is correct since it flows from Article 2(4) of the Charter—authorization to use force should cease with the establishment of a permanent cease-fire unless it is explicitly continued by the Security Council.<sup>89</sup>

Allowing authorizations to use force to continue indefinitely would further alienate the smaller UN members, would decrease the legitimacy of such mandates, and could result in more resistance to them. It could be argued that the converse rule would perversely result in the continuation of hostilities by states so authorized, to avoid the extinguishment of their authorization by way of a cease-fire. But hostilities end and cease-fires are signed when the military and political situations converge in that direction, and states would be unlikely to avoid ending hostilities for fear that their UN authorization would lapse.

### *Practice Prior to the Gulf War*

UN practice prior to the gulf war supports this approach to cease-fire law under the Charter. The various Middle East conflicts between Israel and Arab governments led to strong assertions by the Security Council and UN officials that violations of cease-fires or armistices do not legally justify forceful countermeasures by individual states. When the Security Council, on July 15, 1948, imposed a cease-fire on the belligerents, the UN mediator, Count Bernadotte, sent instructions interpreting the Council's resolution to mean that "(1) No party may unilaterally put an end to the truce. (2) No party may take the law into its own hands and decree that it is relieved of its obligations under the resolution of the Security Council because in its opinion the other party has violated the truce."<sup>90</sup> Nonetheless, the Israelis and Arabs continued to violate the cease-fire on the basis of alleged violations by the other party. The Security Council then adopted a resolution reiterating that "[n]o party is permitted to violate the truce on the ground that it is undertaking reprisals or retaliations against the other party."<sup>91</sup>

In 1956, as the Middle East situation deteriorated, the Security Council asked Secretary-General Dag Hammarskjöld to review enforcement of and compliance with the armistice agreement. Both Israel and Egypt desired the armistice to allow—in conformity with pre-Charter customary international law—each party the right to take reprisals in response to the other's violations. The Secretary-General rejected that view, arguing "that [Israeli-Egyptian] compliance [with the armistice] should be unconditional, subject only to resort to the Security Council if attacked and the inherent right to self-defense." Even the right of self-defense was narrowly circumscribed: "only the Security Council could decide that a case of non-compliance was a justification for self-defense [under] Article

<sup>89</sup> A distinction should be made between permanent cease-fires designed to end hostilities definitively and a temporary lull in fighting or a provisional military cease-fire designed to last only a few days or weeks until a more permanent cessation of fighting is reached. The Korean armistice and gulf war cease-fires were clearly designed to end hostilities permanently, although resolution of some of the underlying political tensions could take years or decades to achieve. Moreover, other forms of a definitive end to hostilities should be subsumed within this proposed rule, such as the situation where the states acting under Security Council authority permanently withdraw their forces after a humanitarian intervention, as happened in Somalia.

<sup>90</sup> See Morris, *supra* note 82, at 839. Shabtai Rosenne, the former Legal Adviser to the Israeli Ministry of Foreign Affairs, noted the fundamental change in the law relating to armistice agreements: "our Armistice Agreements are always subordinate to the obligation, contained in the Charter, to refrain from the threat or use of force and to settle international disputes by peaceful means." *Id.* at 849.

<sup>91</sup> 1 SYDNEY D. BAILEY, *HOW WARS END* 293 (1982). This statement is based on the post-Charter rule that Article 2(4) prohibits reprisals. REISMAN & BAKER, *supra* note 29, at 50–52, 76–71, have questioned whether that purportedly ironclad rule accurately reflects state practice.

51." For Hammarskjöld, the key principle was the binding nature of the cease-fire, irrespective of infringements of other articles of the armistice, a principle that resulted from the basic obligations of all UN members not to use force.<sup>92</sup>

It might be argued that UN-negotiated or -imposed cease-fires ending hostilities between individual states are different from a UN cease-fire terminating hostilities between UN-authorized forces and an aggressor state. While there is an obvious factual difference when the United Nations is a party to the conflict, both situations present similar theoretical problems and scholars have not treated them differently.

Most cases of hostilities between nations will involve claims by at least one nation of authorization under Article 51 of the Charter to use force in self-defense. Nonetheless, a UN-imposed or -brokered cease-fire will extinguish that nation's claim of right under Article 51, even if the cease-fire does not fully vindicate its claims. Similarly, nations acting pursuant to a Chapter VII authorization have a valid right to use force, but that right is also extinguished after hostilities end and a permanent cease-fire is promulgated. In both situations the Charter's command that peaceful means be used to settle disputes requires that nations not use force after the imposition of a cease-fire unless either a new aggression occurs, reactivating Article 51, or authorization is given by the Security Council. For example, if Kuwait, with the assistance of the United States and Saudi Arabia, had operated exclusively under Article 51 and successfully reversed its conquest by Iraq, a UN-brokered cease-fire would have extinguished any right of those states to resume fighting in the event of an Iraqi violation of the cease-fire agreement (unless Iraq invaded Kuwait, retriggering Article 51). The legal situation should not be different because Resolution 678, and not solely Article 51, authorized the coalition's efforts.

It could still be argued that force used under Security Council authorization ought to be different from wars between individual nations because UN authorizations might be broader than the Article 51 exception and might therefore survive a cease-fire. For example, Resolution 678 and Korean War Resolution 83 both contain broad language authorizing force, not merely to defend Kuwait and South Korea, but "to restore international peace and security in the area." However, the experience under the Korean armistice strongly suggests that Council authorizations to use force end with a cease-fire or armistice. That armistice ended hostilities but did not explicitly extinguish or continue the Resolution 83 authorization to use force.<sup>93</sup> In the negotiations leading to the armistice, the South Korean Government took the position that violations of the armistice by North Korea or failure to achieve Korean unification at the political conference proposed in the armistice should automatically lead to a resumption of hostilities.<sup>94</sup> The United States and the UN coalition rejected that position, although the sixteen UN members with armed forces in Korea stated their commitment to defend South Korea if attacked by the North.<sup>95</sup>

In 1955 and again in 1956, South Korea argued at the United Nations that North Korean and Chinese violations warranted termination of the armistice and the resump-

<sup>92</sup> See Report of the Secretary-General to the Security Council pursuant to the Council's resolution of 4 April 1956 on the Palestine question, UN SCOR, 11th Sess., Supp. for Apr.-June, at 40, UN Doc. S/3596 (1956).

<sup>93</sup> See Agreement concerning a Military Armistice in Korea, July 27, 1953, Art. V, para. 62, 4 UST 234, 261 (providing that the "Agreement shall remain in effect until expressly superseded either by mutually agreeable amendments and additions or by provision in an appropriate agreement for a peaceful settlement at a political level between both sides").

<sup>94</sup> See BURTON I. KAUFMAN, *THE KOREAN WAR: CHALLENGES IN CRISIS, CREDIBILITY AND COMMAND* 200-02 (2d ed. 1997).

<sup>95</sup> See Letter dated 7 August 1953 from the Acting U.S.A. Representative to the UN, addressed to the Secretary-General, transmitting a special report of the Unified Command on the armistice in Korea in accordance with the Security Council Resolution of 7 July 1950 (S/1588), UN Doc. S/3079 (1953); see also GOODRICH, *supra* note 51.

tion of hostilities, a position that no other country adopted.<sup>96</sup> In 1957 the Unified Command announced that Communist violations of the armistice provision prohibiting the introduction of combat equipment and weapons relieved the Unified Command of its obligation to comply with that provision, but that it would continue to observe the cease-fire and implement all of the other armistice provisions.<sup>97</sup> The Unified Command's position was thus consistent with Hammarskjöld's position in 1956 and Bernadotte's view in 1948.

In 1967 the United States brought the Security Council's attention to serious violations of the armistice, including armed attacks resulting in almost five hundred UN and South Korean casualties. The United States claimed the right to take "appropriate measures in self-defense" to protect "civilians and military personnel" but studiously avoided making any claim or threat to take forceful countermeasures against North Korea.<sup>98</sup> One military analyst of the armistice concludes that in only one incident during the whole period between 1953 and 1967 did the UN forces engage in what might be construed as a reprisal for armed attacks against South Korea,<sup>99</sup> and even that incident could come within the law of hot pursuit.

### *The Iraqi Cease-Fire and the General Rule on Cease-Fires*

The permanent cease-fire that ended the 1991 Persian Gulf war supports, although not completely without doubt, the general rule that Security Council authorizations of force expire with a cease-fire. Resolution 687 is a detailed resolution that sets the terms for a formal cease-fire; it includes provisions on, inter alia, settling the boundary dispute between Iraq and Kuwait; establishing a demilitarized zone; eliminating Iraq's chemical, biological and nuclear weapons capability; continuing economic sanctions; and setting up a compensation fund. The terms of the resolution do not state that force can be employed unilaterally by UN member states to enforce its mandates. Its paragraph 1, however, does affirm that all thirteen prior Security Council resolutions, to the extent not modified by 687, survived the cease-fire, and Secretary-General Boutros Boutros-Ghali believed that Resolution 678 "remained in force" even after the cease-fire.<sup>100</sup> Despite the general terms of paragraph 1, the history and text of the cease-fire resolutions clearly show that the Resolution 678 authorization to use force expired with the conclusion of the permanent cease-fire.

After the suspension of hostilities, a provisional cease-fire, Resolution 686, was accepted. The distinction between a temporary cease-fire that does not terminate an authorization and a permanent one that does is illustrated by these Iraqi resolutions. Resolution 686 explicitly refers to paragraph 2 of Resolution 678, the "all necessary means" authorization, and "recognizes" that it "remain[s] valid" "during the period required for Iraq to comply with" the terms of the provisional cease-fire. Thus, the unilateral use of force provision of Resolution 678 would remain "valid" only temporarily,

<sup>96</sup> See Unified Command Report on the Neutral Nations Supervisory Commission in Korea, UN Doc. A/3167 (1955); 1956 U.N.Y.B. 129, 130; see also BAILEY, *supra* note 91, at 474-75.

<sup>97</sup> BAILEY, *supra* note 91, at 478.

<sup>98</sup> See United Nations Command Report to the United Nations on the increase in violations by North Korea of the Military Armistice Agreement in Korea, UN Doc. S/8217, at 5-6 (1967).

<sup>99</sup> See Simon, *supra* note 83, at 126-27.

<sup>100</sup> UN DEPT OF PUBLIC INFORMATION, THE UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT, 1990-1996, UN Sales No. E.96.I.3 (1996) (*Introduction* by Boutros Boutros-Ghali, Secretary-General of the United Nations, at 33) [hereinafter IRAQ-KUWAIT CONFLICT]. It is unclear what "remained in force" meant, because he could not have meant that any member state could continue to attack Iraq despite the formal cease-fire.

pending Iraqi compliance with the provisional cease-fire.<sup>101</sup> Moreover, the Security Council rejected a U.S. effort to authorize force if Iraq failed to comply with all the provisions of the cease-fire.<sup>102</sup>

Resolution 687, in contrast to Resolution 686, did not explicitly state that Resolution 678 would remain valid until Iraq complied with its detailed terms.<sup>103</sup> The crux of Resolution 687 was the transformation of the temporary cessation of hostilities into a permanent cease-fire upon Iraq's *acceptance* of, not compliance with, its terms.<sup>104</sup> Of all the detailed provisions in the cease-fire, only paragraph 4 guaranteeing the inviolability of the Iraq-Kuwait border contains language authorizing the use of force, and then only by the Security Council and not by individual states.<sup>105</sup> That the Council decided to guarantee Kuwait's boundary by force if necessary—a guarantee that is central to both Article 2(4) of the Charter and the 1991 Persian Gulf war—excludes an interpretation of Resolution 687 as continuing the Resolution 678 authorization so as to allow individual nations to use force to rectify other, presumably less central violations. It would be illogical for Resolution 687 to require Security Council action to authorize force against threatened boundary violations, yet dispense with such action if Iraq violated another provision of the resolution.<sup>106</sup>

<sup>101</sup> The conditions of the provisional cease-fire required Iraq to rescind its purported annexation of Kuwait; accept in principle its liability for damages suffered by Kuwait; release prisoners and other nationals it held; return Kuwait's property; and provide information on mines and chemical and biological weapons in Kuwait, and in allied occupied Iraqi territory (but not in Iraq generally). Resolution 686 did not include any obligation to submit to inspections. See SC Res. 686 (Mar. 2, 1991), *reprinted in* 30 ILM 568 (1991).

<sup>102</sup> The language in Resolution 686 was subject to negotiations in the Council. The U.S. first draft contained a broader authorization that would have affirmed the right of the coalition to "resume offensive combat operations if Iraq does not comply with all demands" in the resolution. See Freudenschuß, *supra* note 59, at 499. That would have constituted an explicit authorization of the U.S. right to use force in the event of violations of the provisional cease-fire. The U.S. position was criticized and the resulting language of operative paragraph 4 reiterated the right to use force only in accordance with Resolution 678. See SC Res. 686, *supra* note 101.

<sup>103</sup> The difference in language between 686 and 687 in referring to prior resolutions is significant. Resolution 686, *supra* note 101, "[a]ffirms that all twelve resolutions noted above *continue to have full force and effect*" (emphasis added). The later Resolution 687 contains no such language; it "[a]ffirms all thirteen resolutions noted above, except as expressly changed below to achieve the goals of this resolution, including a formal cease-fire." See SC Res. 687 (Apr. 3, 1991), *reprinted in* 30 ILM 846 (1991).

<sup>104</sup> See SC Res. 687, *supra* note 103; see also UN CHRON., June 1991, at 4. On April 11, Paul Noterdaeme of Belgium, President of the Security Council, formally acknowledged Iraq's acceptance, "adding that Council members had asked him to note that conditions established in the resolution had been met and that the formal cease-fire was effective." *Id.* at 7 (emphasis added). That the permanent cease-fire was declared upon Iraqi acceptance of its terms and not compliance with its provisions (as had been the case with Resolution 686's temporary cease-fire) is evidence that Resolution 678's broad authorization of force was extinguished.

<sup>105</sup> The U.S. first draft of Resolution 687 would have authorized the coalition states "to use all necessary means" to guarantee the border. Freudenschuß, *supra* note 59, at 500. That language was rejected as going too far. The statements by supporters of Resolution 687 at the time of its adoption make clear that individual nations were not empowered to use force, even to respond to a boundary violation. (In the case of a boundary violation that constituted an armed attack on Kuwait, Article 51 would authorize self-defense.) India's representative stated that paragraph 4

does not confer authority on any country to take unilateral action under any of the previous resolutions of the Security Council. Rather, the sponsors have explained to us that in case of any threat or actual violation of the boundary in future the Security Council will meet to take, as appropriate, all necessary measures in accordance with the Charter.

UN Doc. S/PV.2981, at 78 (1991) (remarks of Mr. Ghorekhein, India). Russia explicitly agreed with India's interpretation, which was not contradicted by the sponsors of Resolution 687. *Id.* at 101. Indeed, one sponsor, the United Kingdom, concurred that the provision represented a "guarantee by the Security Council to step in" if the border was violated. *Id.* at 113.

<sup>106</sup> Both India and China abstained on Resolution 686 because they disagreed with its continuation of the Resolution 678 authorization of force. UN Doc. S/PV.2978 (1991), *reprinted in* IRAQ AND KUWAIT, *supra* note 10, at 95, 99. That both countries voted affirmatively for Resolution 687 is further evidence that it was not understood to have continued the authorization under Resolution 678.

Moreover, paragraph 34 of Resolution 687 states the Council's decision "to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area." That provision makes clear that the Council, not individual states, determines not only whether Iraq has violated Resolution 687 but also whether to take "further steps" for its implementation. The express vesting of this authorization in the Security Council is inconsistent with the view that Resolution 678 continues to allow individual states to decide for themselves whether to use force to implement the cease-fire resolution.

Despite the language and history of Resolution 687, U.S. and UK officials have asserted since 1991 that the Resolution 678 authorization to use force remains in effect, and on several occasions they have deployed forces against Iraq.<sup>107</sup> They argue that the traditional material breach doctrine is applicable to UN cease-fires and that an Iraqi breach of the cease-fire therefore reactivates Resolution 678. However, even if the resolution survived the cease-fire and can be reignited under traditional armistice law to address material breaches, the question remains: who decides when a material breach reactivates the authorization to use force—the Security Council or the United States and its coalition partners? The practice since the cease-fire confirms what is central to Resolution 687: that this authority is held by the Security Council alone. Since the Council made the cease-fire with Iraq, it is the party to determine whether Iraq is in breach. Thus, for Council-imposed cease-fires, retaining the material breach doctrine turns out to lead to the same consequences as the Charter rule propounded above: only the Council can decide to resume hostilities.

The question of who determines whether Iraq has materially breached the cease-fire<sup>108</sup> underscores the basic problem with the contracting-out model of UN enforcement: Is this a UN operation for which the threshold decision to employ force is determined by the Security Council? Or once force has been authorized, are all decisions delegated to individual states for the duration of the dispute? Professor Ruth Wedgwood and U.S. officials argue that the "cease-fire on the ground was in fact a decision of coalition forces," not the Council, and that, presumably, any of those forces can therefore declare Iraq in material breach and use force to secure compliance.<sup>109</sup> That coalition forces declared a cessation of hostilities on the ground is not inconsistent with the fact that the formal, legally binding cease-fire was established by the Security Council, not by the United States or any other state. It was declared pursuant to an elaborate Council resolution setting forth its terms and conditions. The Iraqi notification of acceptance, after which the "formal cease-fire is effective," was delivered not to the United States or its coalition partners, but to the Security Council and the Secretary-General. Furthermore, the cease-fire resolution explicitly states that the Council (not individual countries) will "take such further steps as may be required" for its implementation.

The practice since 1991 lends support to the position that a finding by the Security Council of a material breach is necessary before force can be employed. In January 1993,

<sup>107</sup> Shortly after the formal cease-fire, President Bush and other U.S. officials asserted that the Resolution 678 authorization was still in effect and threatened force against Iraq to achieve compliance with Resolution 687. See Letter from President Bush to the Speaker of the House of Representatives and President Pro-Tem of the Senate, 27 WEEKLY COMP. PRES. DOC. 1284 (Sept. 16, 1991). U.S. officials apparently based this interpretation on paragraph 34 of Resolution 687. John E. Yang & John M. Goshko, *Bush Says Iraq Violates Cease-Fire: Pentagon Preparing Range of Options*, WASH. POST, June 29, 1991, at A1.

<sup>108</sup> That the term material breach is objective under Article 60 of the Vienna Convention on the Law of Treaties and not subjective simply means that when one party to an agreement declares a material breach to exist, its subjective view is not dispositive but must be measured against the objective facts. It does not mean that a third party can declare a cease-fire null and void despite the refusal of both parties to the agreement to declare that a material breach exists. See Vienna Convention on the Law of Treaties, opened for signature May 23, 1978, Art. 60, 1155 UNTS 331.

<sup>109</sup> See Wedgwood, *supra* note 46, at 726.

the United States, the United Kingdom and France launched air strikes against Iraq in response to various Iraqi violations of the cease-fire agreement.<sup>110</sup> Those strikes were undertaken only after the Council found the Iraqi actions to "constitute an unacceptable and material breach of the relevant provisions of resolution 687."<sup>111</sup> While the air strikes do suggest that the Security Council was willing at that time to countenance a use of force pursuant to Resolution 678, they also reaffirm what is central to our discussion: that it is for the Council and not individual states to declare Iraq in "material breach" of the cease-fire and thus to authorize force.<sup>112</sup>

Since June 1996, numerous unsuccessful attempts have been made to persuade the Security Council to determine that Iraq is in material breach of the cease-fire agreement.<sup>113</sup> These attempts reflect the UK view that such a Council finding is necessary to authorize military action,<sup>114</sup> a view informed by the traditional law of cease-fires, the UN Charter, Resolution 687 and past practice.

Finally, the winter 1998 practice with respect to the Iraqi inspection regime confirms the general proposition that authorizations by the Council to use force either terminate with a permanent cease-fire or at least require it to declare a material breach and reauthorize force. After Kofi Annan returned from Baghdad in February 1998 with the

<sup>110</sup> In January 1993, Iraqi authorities refused to guarantee the safety and free movement of United Nations aircraft transporting the United Nations Special Commission (UNSCOM) and United Nations Iraq-Kuwait Observation Mission (UNIKOM) personnel into Iraq. Iraq had also crossed the Kuwaiti border without permission and failed to remove its six police posts from the Kuwaiti side of the demilitarized zone. See *IRAQ-KUWAIT CONFLICT*, *supra* note 100, at 86-87.

<sup>111</sup> See Statement by the President of the Security Council concerning United Nations flights into Iraqi territory, UN Doc. S/25081 (1993), and Statement by the President of the Security Council concerning various actions by Iraq vis-à-vis UNIKOM and UNSCOM, UN Doc. S/25091 (1993), reprinted in *IRAQ-KUWAIT CONFLICT*, *supra* note 100, at 512-13. The Security Council President's January 11 statement on behalf of the Security Council "reaffirms that the boundary was at the very core of the conflict" and that in Resolutions 687 and 773 the Security Council had guaranteed the inviolability of the border and undertaken to take all necessary measures to that end as appropriate. These raids therefore do not support the argument that the inspection violation, standing alone, would have authorized force.

<sup>112</sup> The presidential statements of January 8 and 11 follow a line of Security Council statements and resolutions, starting with Resolution 707 of August 15, 1991, and continuing with informal presidential statements of February 19 and 28, 1992, and July 6, 1992, that determined Iraq to be in material breach of Resolution 687. See UN Docs. S/23609, S/23663 & S/24240, respectively (1992). This practice confirms that the determination of material breach was to be made by the Security Council and not by individual member states.

While clearly it would have been preferable for the Council to determine that Iraq was in material breach of the cease-fire and authorize military action by means of a formal resolution, in recent years the Council has relied heavily on presidential statements reflecting the consensus reached in closed sessions by the members. See Kirgis, *supra* note 15, at 519-20.

<sup>113</sup> U.S. officials and at least one scholar have suggested that the United States can deem the cease-fire suspended because the Security Council has found Iraq to be in flagrant or serious violation of prior resolutions. See Wedgwood, *supra* note 46, at 726. But serious violations do not necessarily, as a matter of law, constitute a material breach and the Security Council has decided not to find that a material breach has occurred. It has refused to do so aware of the argument that British and American officials make, that such a finding would negate the cease-fire and pave the way for military action. That the Council chooses to use a host of other terms to characterize Iraqi noncompliance is legally significant: it refuses to use the term that in the past has been taken to legally nullify a cease-fire.

<sup>114</sup> See *UN Council Stops Iraq's Weapons Search Plan*, BALTO. SUN, June 15, 1996, at 7A (United States and United Kingdom had urged Council to declare Iraq in "material breach"); James Bone, *Americans Fail to Win UN Consensus on Military Action*, TIMES (London), Nov. 12, 1997; *ABC News This Week* (Nov. 30, 1997) (Annan stating that Council had decided not to declare Iraq in material breach). When the Iraqi-UN crisis involving UNSCOM inspections heated up in the winter of 1998, the Security Council again repeatedly rejected U.S. and UK efforts to obtain either a resolution or a presidential statement declaring Iraq in material breach of Resolution 687. Only after it became apparent that the Council would not do so did the British shift position and argue that such a resolution was unnecessary. Laura Silber, *UN Deeply Divided Over Use of Force*, FIN. TIMES (London), Feb. 6, 1998, at 4. Even after Annan's February 1998 agreement with Iraq, the British urged the passage of a resolution "which would declare Iraq in material breach" if it did not comply with the agreement. *Richardson Discusses Iraq Deal* (morning ed., NPR broadcast, Feb. 25, 1998). Again, Britain and the United States were rebuffed.

agreement with Iraq's President Saddam Hussein, the United States and the United Kingdom lobbied for a Council resolution that would have automatically authorized force if Iraq violated the Annan agreement. Resolution 1154 not only rejected such automaticity,<sup>115</sup> but clarified the view of a majority of the Council that its explicit authorization was required to renew the use of force.<sup>116</sup> As the Russian delegate noted, "No one can ignore the resolution adopted today and attempt to act by bypassing the Security Council." Similarly, France stated that the resolution was designed "to underscore the prerogatives of the Security Council in a way that excludes any question of automaticity. . . . It is the Security Council that must evaluate the behavior of a country, if necessary to determine any possible violations, and to take the appropriate decisions."<sup>117</sup> While U.S. officials still argue that the failure of its members to introduce language explicitly requiring member states to return to the Council leaves individual nations free to employ force if Iraq violates the resolution, the Council's repeated rebuffs to the U.S. and UK effort to obtain authority to use force constitute if not explicit, at least implicit, disapproval of the U.S. claim.

### CONCLUSION

The crisis in the fall of 1998 regarding the threat of the United States and NATO to use force against Yugoslavia unless it withdrew its security units and army from Kosovo demonstrates that the problems discussed in this article are likely to recur. The United States, again, was asserting that it and its allies have the authority to use force based upon claimed implicit Security Council authorization: Resolution 1199, while it condemned Yugoslavia's actions in Kosovo, did not explicitly authorize the use of force.<sup>118</sup> As in the Iraqi inspection crisis the previous spring, the United States conflated a Security Council condemnation of a nation's actions with an authorization to use force. That conflation

<sup>115</sup> According to members who spoke in the Council, Resolution 1154's sponsors assured other members that the resolution did not automatically authorize nations to use force in the event of an Iraqi violation. As Russia emphasized in the Council, any "hint of automaticity with regard to the application of force has been excluded" and "would have been unacceptable for the majority of the Council." UN Doc. S/PV.3858, *supra* note 4, at 17-18. See also *id.* at 5 (Japan) and 18 (Gambia).

<sup>116</sup> Resolution 1154 warned Iraq that continued violations of its obligations to permit unconditional access to UNSCOM "would have the severest consequences." But this warning did not leave the United States the right to use such force unilaterally in the event of a breach. Paragraph 5 forecloses this possibility. The Security Council does not merely remain seized of the matter, it remains "actively" seized and does so "to ensure implementation of this resolution." SC Res. 1154 (Mar. 2, 1998), reprinted in 37 ILM 503 (1998).

<sup>117</sup> UN Doc. S/PV.3858, *supra* note 4, at 15, 18. See also *id.* at 14 (China), 10 (Kenya, Sweden), 9 (Brazil), and 7 (Costa Rica). Other members strongly implied that individual nations could not use force when they stated that in the event of an Iraqi violation, the Security Council would provide an appropriate response. *Id.* at 9, 12-3, 18 (Gabon, Slovenia, Gambia).

<sup>118</sup> SC Res. 1199 (Sept. 23, 1998). Resolution 1199 expressed the Council's grave concern at the "excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army" in Kosovo, and acted under Chapter VII of the Charter to demand, inter alia, that Yugoslavia "cease all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression." *Id.*, para. 4. The resolution did not mention the use of force, and after the vote Russia explicitly stated that it had voted for it because "no measures of force and no sanctions at this stage are being introduced by the Security Council." Crossette, *supra* note 9, at A1. Moreover, Resolution 1199, in paragraph 16, states that the Security Council "[d]ecides, should the concrete measures demanded in this resolution and Resolution 1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region."

Nonetheless, U.S. officials have argued that Resolution 1199 implicitly gives NATO the authority to use force against Yugoslavia through the invocation of Chapter VII. See *supra* note 9 and Goshko, *supra* note 9. Immediately following a NATO meeting in Brussels on October 8, 1998, Secretary of State Albright stated that she believed Resolution 1199 gave NATO the necessary legal grounds for military action against Serbia. Tim Bucher & Jon Hibbs, *International: Blair Attacks West's Disunity on Kosovo*, DAILY TELEGRAPH (London), Oct. 9, 1998, at 17.



ignored the Charter's requirement that the Council must not only condemn a nation's actions as a threat to the peace, but also decide that force should be employed to counteract the threat.

The grave dangers attendant on a regime of law permitting individual nations or even regional organizations to use nondefensive force without explicit Security Council authorization led all the NATO allies to reject the U.S. position in June 1998.<sup>119</sup> Although NATO has since moved closer to using force without clear Council approval, a number of European nations still appear uneasy about doing so.<sup>120</sup>

When force should be employed to counteract a particular threat to the peace can be difficult to discern, particularly in a world that abounds in dangerous and malevolent actors. Often a real or imagined evil will exert a tremendous centrifugal pull on most of us to support forceful action. Nonetheless, the perils associated with warfare—that great powers can use humanitarian concerns to mask geopolitical interest;<sup>121</sup> that major air strikes such as those threatened against Iraq and Serbia in 1998 have serious consequences in lives lost, destruction caused and the resulting destabilization; that warfare is of limited utility as a means of solving complex, long-standing, underlying problems; that a world order that allows individual or coalitions of nations to deploy offensive military might for what they deem are worthy causes amounts to anarchy—these perils require that force be used only as a last resort as determined by a world body. That principle, inscribed in the UN Charter, stipulates that the Security Council must explicitly approve non-Article 51 uses of force.

During the Cold War, many claimed that the Security Council could not fulfill its first and primary responsibility of ensuring international security. The end of the Cold War and the reversal of Iraq's invasion of Kuwait in 1991 were viewed as reviving the Council's role in collective security. The early 1990s brought fears from some quarters that the United Nations was acquiescing too readily in U.S. uses of force. At times, these fears led to criticisms of explicit UN authorizations of force as illegitimate, unwise, or merely constituting a multilateral veneer for unilateral action. At other times, critics claimed that forceful action was being taken in the name of the United Nations that had not really been authorized by the Security Council.

While it is too early to provide any definitive answer, it may well be that the recent events portend a restoration of the Council's proper role. The world needs a Security

<sup>119</sup> The United States was "the only [NATO] country" that during the June discussion took the position that NATO did not need explicit Security Council authorization to use force in Kosovo. Remarks of Secretary of Defense William S. Cohen at Los Angeles Foreign Affairs Council Breakfast, Federal News Service, June 29, 1998, at 10, available in LEXIS, News Library, Fednew File. See also David Buchan & Ralph Atkins, *Kosovo Crisis Moves into Uneasy Lull*, FIN. TIMES, June 18, 1998, at 2 (German cabinet opposes NATO action without Security Council approval); Paul Koring, *Alliance Rift Weakens Threat of Air Strikes in Kosovo*, GLOBE & MAIL (Toronto), June 24, 1998, at A13 (Canada and France adamant that Council resolution needed); William Drozdiak, *Further NATO Action in Kosovo Now in Doubt*, WASH. POST, June 18, 1998, at A32 (France, Italy, Denmark, Germany will not approve NATO use of force without UN mandate); Susan Blaustein, *End the "Dance of Appeasement,"* L.A. TIMES, June 21, 1998, at 2 (Tony Blair insists on securing Council resolution). Secretary-General Annan openly stated that "[a]ll use of military power by regional groups should be sanctioned by the United Nations." Moreover, "[i]t would set a dangerous precedent . . . —who else are they going to discipline tomorrow? How could they tell other regions or governments not to do the same thing without Council approval?" UN Press Release No. SG/T/2142 (July 6, 1998) ([www.un.org/News/Press](http://www.un.org/News/Press)). European officials also feared that NATO action would set a precedent that would allow other countries to bypass the Security Council in the future. See Drozdiak, *supra*.

<sup>120</sup> See Roger Cohen, *Americans Rebuke Yugoslav Leaders*, N.Y. TIMES, Oct. 9, 1998, at A1 (naming Germany, Italy and Denmark as having such reservations).

<sup>121</sup> The strong opposition to the proposed U.S. attack may be explained by the fact that many perceived that U.S. geopolitical reasons and not merely enforcing the inspections regime were motivating U.S. saber rattling. See Roger Cohen, *The World: War Fever; The Weapons Too Terrible for the Parade of Horribles*, N.Y. TIMES, Feb. 8, 1998, §4, at 1.

Council powerful enough and sufficiently unified to authorize strong countermeasures against aggressors or genocidal regimes and yet not be a mere multilateral rubber stamp for unilateral decision making. It must steadfastly uphold its mandate pursuant to Article 41 to authorize force only as a last resort.

#### POSTSCRIPT

On December 16, 1998, the United States and the United Kingdom launched four days of air strikes against Iraq, claiming that Iraq had failed to cooperate fully with the UN weapon inspectors. The United States and Great Britain acted without obtaining the Security Council's authorization to use force and, thus, as this article has argued, in violation of the Charter.<sup>122</sup> The United States and Great Britain argued, as they had in February, that they had legal authority to use force to respond to Iraqi cease-fire violations. Other nations again disagreed.<sup>123</sup>

The December 1998 bombing of Iraq suggests that our hopeful prediction of a strengthened role for the Security Council in controlling the use of force must be tempered by the painful reality of superpower unilateralism. The symbolism of the bombs falling on Iraq while the Council debated its response to a report from a UN special commission about Iraqi compliance with UN resolutions starkly illustrates the refusal of the United States to accept limits on its power. The U.S. position is that it will enforce Security Council resolutions by force, whether or not the Council sees fit to do so. In the short run, the Council was rendered impotent. For the long term, the consequences are potentially serious. The Security Council will be reluctant to authorize and contract out force it cannot control; powerful nations will act on their own.

<sup>122</sup> On November 5, 1998, at its 3939th meeting, the Security Council adopted Resolution 1205, which condemned Iraq's decision to cease cooperation with UNSCOM as "a flagrant violation of Resolution 687" but did not authorize the use of force. See Josh Friedman, *UN Council Scolds Iraq, Condemnation Falls Short of Military Threat*, NEWSDAY, Nov. 6, 1998, at A18. Various members stressed, as they had in February, the "prerogatives" of the Council and argued that its control over international peace and security "must not be circumvented." See Security Council Press Release No. SC/6591, at 5 (France), 7 (Sweden; Brazil), 6 (Russia), 8 (Kenya) (Nov. 5, 1998).

<sup>123</sup> Only three Security Council members—Japan, the United States and Britain—spoke in favor of the air strikes. Security Council Press Release No. SC/6611, at 5 (UK), 8 (U.S.) 9 (Japan) (Dec. 16, 1998). The Russians and Chinese accused the United States and the United Kingdom of an "unprovoked act of force" that "violated the principles of international law and the principle of the Charter," *id.* at 4 (Russia). A number of nonpermanent members opposed the use of force and reiterated that force must be authorized by the Security Council, *id.* at 6 (Costa Rica), 8 (Sweden), 9 (Brazil), 10 (Kenya). International reaction was generally negative, although some European and Asian allies supported the military action.

## NOTES AND COMMENTS

### LEGAL ASPECTS OF THE USE OF A PROVISIONAL NAME FOR MACEDONIA IN THE UNITED NATIONS SYSTEM

The admission of Macedonia to membership in the United Nations in April 1993 required the new member to be "provisionally referred to for all purposes within the United Nations as 'the former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State."<sup>1</sup> The term "difference" here refers to the dispute between Greece and Macedonia over the use of the applicant state's name. In its Resolution 817 of April 7, 1993 (by which the applicant state was recommended for admission to the United Nations), the Security Council "*urge[d]* the parties to continue to cooperate with the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia in order to arrive at a speedy settlement of their difference."<sup>2</sup> Thus, the admission of Macedonia to the United Nations was subject to its acceptance of being provisionally referred to as the "Former Yugoslav Republic of Macedonia" (FYROM) and of negotiating with Greece over its name. I will examine the nature and legal basis of these requirements with respect to the conditions laid down in Article 4 of the UN Charter for the admission of states to the Organization.

The conditions for the admission of states were the subject of exhaustive political and legal deliberations at the United Nations during the 1940s when many states were applying for membership.<sup>3</sup> During the first several years of the Organization's existence, admission to, and even representation in, the United Nations were subject to various conditions (outside the scope of those contained in Article 4 of the Charter), which in some cases required recognition of the applicant (as an international subject) prior to its admission to membership.<sup>4</sup>

In an effort to resolve the dilemmas regarding the legal aspects of the conditions required for admission to membership and to eliminate the various stalemates that were occurring in the admission process, the UN General Assembly, by Resolution 113 (II) of November 17, 1947, requested that the International Court of Justice give an advisory opinion on the following question:

Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article?<sup>5</sup>

The following conditions are expressly set forth in Article 4, paragraph 1 of the UN Charter, which provides: "Membership in the United Nations is open to all other [i.e., other than the original UN members] peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." The next paragraph of the article states the

<sup>1</sup> SC Res. 817, UN SCOR, 48th Sess., Res. & Dec., at 132, para. 2, UN Doc. S/INF/49 (1993); GA Res. 47/225, UN GAOR, 47th Sess., Supp. No. 49, Vol. 2, at 6, UN Doc. A/47/49 (1993).

<sup>2</sup> SC Res. 817, *supra* note 1, para. 1.

<sup>3</sup> See, e.g., UN SCOR, 1st Sess., 2d series, Supp. 4, at 40, 47, 53 (1946); *id.*, 2d Sess., Spec. Supp. 3, at 29, 35–36, 42, 51–53 (1947).

<sup>4</sup> See UN SCOR, 2d Sess., 181st mtg. at 1920, 1935 (1947); *id.*, 3d Sess., 330th mtg. at 16 (1948).

<sup>5</sup> GA Res. 113 (II), UN GAOR, 2d Sess., Res., at 19 (1947).

procedural rule that "[t]he admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."

In its Advisory Opinion, *Admission of a State to the United Nations*, the Court first concluded that the question put to it in an abstract form had a legal nature. Consequently, the Court was required to provide an interpretation of Article 4, paragraph 1 of the Charter and, by virtue of Article 96 of the Charter and Article 65 of its Statute and as "the principal judicial organ of the United Nations," it had the competence to give such an interpretation. The Court then observed that paragraph 1 of Article 4 in effect contains five conditions: to be admitted to membership in the United Nations, an applicant must (1) be a state; (2) be peace-loving; (3) accept the obligations of the UN Charter; (4) be able to carry out these obligations; and (5) be willing to do so. Further, the Court found that the question put to it by the General Assembly could be reduced to the following:

are the conditions stated in paragraph 1 of Article 4 exhaustive in character in the sense that an affirmative reply would lead to the conclusion that a Member is not legally entitled to make admission dependent on conditions not expressly provided for in that Article, while a negative reply would, on the contrary, authorize a Member to make admission dependent also on other conditions.<sup>6</sup>

After thorough consideration, the International Court of Justice formulated its advisory opinion stating that a member of the United Nations that is called upon, by virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a state to membership in the Organization, is not juridically entitled to make its consent dependent on conditions not expressly provided in paragraph 1 of that article.<sup>7</sup>

Among the most important arguments used by the Court in arriving at the above opinion were that (1) the UN Charter is a multilateral treaty whose provisions impose obligations on its members; (2) the text of paragraph 1 of Article 4, "by the enumeration which it contains and the choice of its terms, clearly demonstrates the intention of its authors to establish a legal rule which, while it fixes the conditions of admission, determines also the reasons for which admission may be refused";<sup>8</sup> and (3) the enumeration of the conditions in paragraph 1 of Article 4 is exhaustive (and "not merely stated by way of guidance or example"<sup>9</sup>), which follows from the fact that if the opposite were the case, "[i]t would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions."<sup>10</sup>

In its deliberations, the Court specifically analyzed whether the political character of the organs responsible for admission (the Security Council and the General Assembly, by virtue of paragraph 2 of Article 4), or for the maintenance of world peace (the Security Council, pursuant to Article 24 of the Charter), engendered arguments leading to the contrary conclusion regarding the exhaustive character of the conditions enumerated in paragraph 1 of Article 4. The Court rejected this interpretation and held that "[t]he political character of an organ cannot release it from the observance of the treaty

<sup>6</sup> See *Admission of a State to the United Nations* (Charter, Art. 4), Advisory Opinion, 1948 ICJ REP. 57, 61 (May 28).

<sup>7</sup> *Id.* at 65.

<sup>8</sup> *Id.* at 62.

<sup>9</sup> *Id.*

<sup>10</sup> 1948 ICJ REP. at 63 (in which case paragraph 1 of Article 4 would cease to be a legal norm). It follows that the conditions laid down in paragraph 1 of Article 4 are not only necessary, but also sufficient conditions for admission to membership in the United Nations.

provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.”<sup>11</sup> Thus, the Charter limits the freedom of political organs and no “political considerations” can be superimposed on, or added to, the conditions set forth in Article 4 that could prevent admission to membership. This does not mean, however, that the conditions of Article 4 preclude taking into account relevant political factors that fall within their scope. Appreciation of such factors derives from the very broad and elastic nature of the prescribed conditions and, according to the Court, it does not contradict the exhaustive character of these conditions.

The advisory opinion of the Court makes it apparent that, besides their exhaustive and explicit character, the conditions laid down in Article 4 of the Charter have two additional characteristics: (1) they must be fulfilled before admission is effected; and (2) once they are recognized as having been fulfilled, the applicant state acquires an unconditional right to UN membership. This last feature also follows from the “openness” to membership enshrined in Article 4, which comports with the universal character of the Organization.<sup>12</sup>

The advisory opinion of the International Court of Justice was presented to the General Assembly at its third session, in December 1948. At that session the General Assembly adopted Resolution 197 (III), by which it “[r]ecommend[ed] that each member of the Security Council and of the General Assembly, in exercising its vote on the admission of new Members, should act in accordance with the foregoing opinion of the International Court of Justice.”<sup>13</sup>

This resolution and the Court’s advisory opinion have direct legal relevance to the issue of the admission of Macedonia to membership in the United Nations, since these documents interpret the Charter in a manner that limits the power of the UN organs to impose conditions on admission. The preamble to Security Council Resolution 817, by which Macedonia was recommended for admission, recognized that “the applicant fulfils the criteria for membership laid down in Article 4 of the Charter of the United Nations.”<sup>14</sup> According to *Admission of a State to the United Nations* and General Assembly Resolution 197, this statement means that the applicant has fulfilled all the required conditions for admission to membership in the United Nations and that no other conditions may be imposed. Contrary to the usual wording of Security Council resolutions recommending admission of a state, Resolution 817, after recognizing the fulfillment of the conditions in Article 4, contains an additional consideration, “that a difference has arisen over the name of the State, which needs to be resolved in the interest of the maintenance of peaceful and good-neighbourly relations in the region.”<sup>15</sup> This condition, which is found in the introductory part of the resolution, is reflected in its paragraph 2, which recommends the admission of the applicant state to membership in the United Nations. It describes “this State” as “being provisionally referred to for all purposes within the United Nations as ‘the

<sup>11</sup> *Id.* at 64.

<sup>12</sup> This view of the Court was elaborated specifically and in depth by Judge Alvarez in his concurring individual opinion. He stated that,

having regard to the nature of the universal international society, the purposes of the United Nations Organization and its mission of universality, it must be held that all States fulfilling the conditions required by Article 4 of the Charter have a *right* to membership in that Organization. The exercise of this right cannot be blocked by the imposition of other conditions not expressly provided for by the Charter, by international law or by a convention, or on grounds of a political nature.

*Id.* at 71.

<sup>13</sup> GA Res. 197 (III), UN GAOR, 3d Sess., Res., pt. 1, at 30 (1948).

<sup>14</sup> SC Res. 817, *supra* note 1, preamble.

<sup>15</sup> *Id.*

former Yugoslav Republic of Macedonia' pending settlement of the difference that has arisen over the name of the State." The Macedonian Government strongly objected to the use of this provisional name,<sup>16</sup> stating that "under no circumstances" was it prepared to accept that designation as the name for the country. Nevertheless, the text of the resolution remained unchanged. As a consequence, the imposed obligation to accept this provisional denomination and the closely related obligation to negotiate over the name of the country served as additional conditions that it was required to satisfy so as to gain admission to the United Nations.

These unusual conditions in Resolution 817 are extraneous to the limited list laid down in Article 4. Furthermore, these conditions transcend the act of admission in time. Since the Charter makes no provision for other conditions for admission, it appears that the conditions imposed on Macedonia have no legal basis. Certainly, the ICJ's advisory opinion makes clear that all the conditions for admission to membership must be fulfilled before admission is effected. Since the conditions that were imposed represent purely political considerations, they are incompatible with the letter and spirit of the UN Charter.

Also relevant is the fact that Security Council Resolution 817, after explicitly recognizing that the applicant state had "fulfil[led] the criteria for membership laid down in Article 4," recommended to the General Assembly that the state be admitted. The act of recommendation necessarily recognized that the conditions of Article 4 had been fulfilled. The additional conditions that were attached to the recommendation of Macedonia for membership in the United Nations therefore created a logical inconsistency because the Charter contains a closed list of requirements. Once those requirements are found to have been satisfied, the state has a right to admission. Additional conditions attached by the Security Council and General Assembly appear to negate the conclusion that the state is entitled to admission in accordance with the Charter conditions that were met.

Thus, the recognition of its fulfillment of the conditions for admission means that the Security Council affirmed that the applicant country is a peace-loving state, able and willing to carry out the obligations in the Charter, which include (among others) the obligation set forth in Article 2, paragraph 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." On this basis, it appears contradictory and incompatible with the law for the Security Council resolution to report that "a difference has arisen over the name of the State, which needs to be resolved in the interest of the maintenance of peaceful and good-neighbourly relations in the region." This provision implies that the applicant state is unwilling to carry out the obligation contained in Article 2, paragraph 4. The ICJ's above-mentioned advisory opinion and General Assembly Resolution 197 do not permit such contradictory statements—either the test for admission is met or it is not. The principles of exhaustiveness, explicitness, prior fulfillment and recognition, which are embedded in the Court's interpretation of the conditions of Article 4 of the Charter, must mean that it would be logically inconsistent for additional conditions to be attached to the resolutions that recommend or the decisions that provide for the admission of a state.

It can be argued that the logic of the Court's opinion also relates to the provision in Article 2, paragraph 7, of the Charter, which states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially

<sup>16</sup> See UN SCOR, 48th Sess., Supp. for Apr.–June, at 35, UN Doc. S/25541 (1993).

within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."

Thus, in interpreting this paragraph in connection with the admission of states to membership in the United Nations, Judge Krylov (who took part in the 1948 ICJ proceedings) stated that a "Member of the United Nations is not justified in basing [its] opposition to the admission of a particular State on arguments which relate to matters falling essentially within the domestic jurisdiction of the applicant State."<sup>17</sup> This statement reiterates the principle, embedded in the advisory opinion of the Court and in General Assembly Resolution 197, that, once the appropriate UN organs determine that the criteria of Article 4 have been fulfilled, neither a UN organ nor a member of the Organization can condition the admission of the applicant state on any additional consideration, particularly if it essentially falls within that state's domestic jurisdiction. Certainly, the name a state wishes to adopt is a domestic matter, having no direct impact on any other state.

Furthermore, on the basis of the principle of separability of domestic and international jurisdiction, it can be argued that the substantive Greek allegation that the name of the applicant implies "territorial claims" has no legal significance. Obviously, the name of a state, which is a subject of that state's domestic jurisdiction (since every state naturally has an inherent right to a name), does not create international legal rights for the state that adopts the name, nor does it impose legal obligations on other states. Clearly, the name, per se, does not have a direct impact on the territorial rights of states. Greece advanced practically the same objections and demands as regards the recognition of Macedonia by the members of the European Community. Nevertheless, the EC Arbitration Commission on former Yugoslavia did not link the name of the country (Republic of Macedonia) to Greek territorial rights.<sup>18</sup> Prominent scholars of international law have expressed similar views. For instance, in their course book on international law, Professors Henkin, Pugh, Schachter and Smit observe that there "appears to be no basis in international law or practice" for the Greek demand that Macedonia change its name, "claiming that the right to use that name should belong exclusively to Greece."<sup>19</sup> It is apparent that the Greek demands regarding the name of Macedonia are motivated mainly by concern that the admission to the United Nations of a state with that name may add strength in the political arena to possible Macedonian claims to Greek territory. The name itself has no legal bearing on such a potential dispute and no relevance to the qualifications that may legally be considered in connection with the admission of a state to the United Nations.

To nullify the Greek concerns that the name of the country implies territorial claims against Greece, Macedonia adopted two amendments to its Constitution on January 6, 1992. They assert that Macedonia "has no territorial claims against any neighboring states"; that its borders can be changed only in accordance with the Constitution and "generally accepted international norms"; and that, in exercising care for the status and rights of its citizens and minorities in neighboring countries, it "shall not interfere in the sovereign rights of other States and their internal affairs."<sup>20</sup> It can further be noted that after the two countries concluded the Interim Accord of September 13, 1995, under the auspices of the United Nations, their relations entered into a period of steady and progressive development.

<sup>17</sup> Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, 1948 ICJ REP. 57, 113 (May 28) (Krylov, J., dissenting).

<sup>18</sup> See EC Arbitration Commission on Yugoslavia, Opinion No. 6, 31 ILM 1507, 1511 (1992).

<sup>19</sup> LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 253 (3d ed. 1993).

<sup>20</sup> For an English translation of the Macedonian Constitution, including amendments, see 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD & Supp. 98-6, at 1 (Albert P. Blaustein & Gisbert H. Flanz eds., 1994, 1998).

From the point of view of legal theory, the inherent right of a state to have a name can be derived from the *necessity* for a juridical personality to have a *legal identity*. In the absence of such an identity, the juridical person (such as a state) could—to a considerable degree (or even completely)—lose its capacity to conclude agreements and independently enter into and conduct its relations with other juridical persons. Therefore, the name of a state appears to be an *essential element of its juridical personality* and its statehood. The principles of the sovereign equality of states<sup>21</sup> and the inviolability of their juridical personality<sup>22</sup> lead to the conclusion that the choice of a name is an inalienable right of the state. In this context, external interference with this basic right appears to be inadmissible, irrespective of territorial and similar arguments. This conclusion is consistent with the previously cited opinion of Henkin, Pugh, Schachter and Smit that states have no exclusive rights to names under international law. Perhaps the international community should develop appropriate legal mechanisms and rules for hypothetical situations when two or more states wish to adopt the same name. This is not the case in the Greek-Macedonian dispute, however, since the name "Macedonia" is used by Greece to designate one of its provinces (which is not an international legal person).

The question of a juridical linkage between the conditions for admission to UN membership and the conditions for recognition of a state was deliberated in the United Nations at the beginning of the 1950s. A memorandum on legal aspects of representation in the United Nations<sup>23</sup> was prepared by the Secretariat and communicated to the Security Council. The memorandum emphasized that the recognition of a state and its admission to UN membership are governed by different rules. Recognition is essentially a "political" decision of individual states, whereas admission to membership is a collective act of the General Assembly based on the right to membership of any state that meets the prescribed criteria. Therefore, there is no link—juridical or otherwise—between the conditions for recognition of a state by another state and the conditions for admission as a member to the United Nations. On this basis, the memorandum stressed that it is inadmissible to condition admission on recognition, since admission does not imply recognition by any government.<sup>24</sup> This conclusion is consistent with the previously discussed advisory opinion of the International Court of Justice and with the principle of universality of the United Nations.

In conclusion, once the conditions set forth in Article 4 of the UN Charter have been fulfilled, the applicant state acquires an inalienable right to UN membership. On the basis of the Security Council's assessment that Macedonia had satisfied the conditions of Article 4 and General Assembly Resolution 197 regarding observance of the advisory opinion of the International Court of Justice, it appears that the Macedonian application for membership should have been handled in accordance with the existing standard admission procedure and law. The additional conditions related to the name of the state constitute violations of the Charter.

IGOR JANEV\*

<sup>21</sup> UN CHARTER Art. 2, para. 1.

<sup>22</sup> Declaration on Principles of International Law concerning Friendly Relations and co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, at 121, 123, 124, UN Doc. A/8028 (1970).

<sup>23</sup> Memorandum on legal aspects of the problem of representation in the United Nations, UN Doc. S/1466, at 2 (1950).

<sup>24</sup> *Id.* at 3.

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# CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

SEAN D. MURPHY

## A NOTE TO OUR READERS

After many years of devoted service to the *American Journal of International Law* as the Editor of Contemporary Practice of the United States Relating to International Law, Marian Nash (Leich) has retired. The *AJIL* Board of Editors would like to thank Ms. Nash for her contribution to the *Journal* and to extend its best wishes to her. Beginning with this issue, Professor Sean Murphy of George Washington University School of Law has assumed editorial responsibility for the Contemporary Practice of the United States section.

## LEGAL REGULATION OF USE OF FORCE

### *Missile Attacks on Afghanistan and Sudan*

On August 7, 1998, bombs exploded at the U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing nearly three hundred people, including twelve Americans. Investigation into the coordinated attacks led U.S. officials to suspect the involvement of Osama bin Laden, a wealthy Saudi expatriate living in Afghanistan, who reportedly had developed an extensive network of terrorists committed to acts of violence against the United States and its nationals.

On August 20, 1998, the United States launched seventy-nine Tomahawk cruise missiles against paramilitary training camps in Afghanistan and against a Sudanese pharmaceutical plant that the United States identified as a chemical weapons facility. The missiles were launched from a U.S. submarine and several surface warships in the Red Sea and Arabian Sea. According to the Clinton administration, the training camps in Afghanistan were associated with three militant Islamic terrorist groups, including that of bin Laden. Further, the Clinton administration asserted that bin Laden, who had lived in Sudan before being expelled in May 1996, had ties to the pharmaceutical plant, which produced or stored a precursor chemical used for making a potent chemical weapon, known as VX.

President Clinton announced the missile attacks as he prepared to return to Washington, D.C., from his vacation in Massachusetts. The President stated in part:

Today I ordered our Armed Forces to strike at terrorist-related facilities in Afghanistan and Sudan because of the threat they present to our national security.

. . . .

I ordered this action for four reasons: First, because we have convincing evidence these groups played the key role in the Embassy bombings in Kenya and Tanzania; second, because these groups have executed terrorist attacks against Americans in the past; third, because we have compelling information that they were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa; and fourth, because they are seeking to acquire chemical weapons and other dangerous weapons.<sup>1</sup>

<sup>1</sup> Remarks on Departure for Washington, DC, from Martha's Vineyard, Massachusetts, 34 WEEKLY COMP. PRES. DOC. 1642 (Aug. 20, 1998).

Later that afternoon, in a nationwide televised address from the White House, President Clinton explained the objectives:

Our target was terror. Our mission was clear, to strike at the network of radical groups affiliated with and funded by Usama bin Ladin, perhaps the preeminent organizer and financier of international terrorism in the world today.

The groups associated with him come from diverse places but share a hatred for democracy, a fanatical glorification of violence, and a horrible distortion of their religion to justify the murder of innocents. They have made the United States their adversary precisely because of what we stand for and what we stand against.

A few months ago, and again this week, bin Ladin publicly vowed to wage a terrorist war against America, saying, and I quote, "We do not differentiate between those dressed in military uniforms and civilians. They're all targets."

Their mission is murder and their history is bloody. In recent years, they killed American, Belgian and Pakistani peacekeepers in Somalia. They plotted to assassinate the president of Egypt and the Pope. They planned to bomb six United States 747's over the Pacific. They bombed the Egyptian Embassy in Pakistan. They gunned down German tourists in Egypt.

... There is convincing information from our intelligence community that the bin Ladin terrorist network was responsible for [the Kenya and Tanzania] bombings. Based on this information, we have high confidence that these bombings were planned, financed and carried out by the organization bin Ladin leads.

America has battled terrorism for many years. Where possible, we've used law enforcement and diplomatic tools to wage the fight. ...

But there have been and will be times when law enforcement and diplomatic tools are simply not enough, when our very national security is challenged, and when we must take extraordinary steps to protect the safety of our citizens. With compelling evidence that the bin Ladin network of terrorist groups was planning to mount further attacks against Americans and other freedom-loving people, I decided America must act.

... Our forces targeted one of the most active terrorist bases in the world. It contained key elements of the bin Ladin network's infrastructure and has served as a training camp for literally thousands of terrorists from around the globe. We have reason to believe that a gathering of key terrorist leaders was to take place there today, thus underscoring the urgency of our actions.

....

The United States does not take this action lightly. Afghanistan and Sudan have been warned for years to stop harboring and supporting these terrorist groups. But countries that persistently host terrorists have no right to be safe havens.<sup>2</sup>

In a report to the Speaker of the House of Representatives and to the President of the Senate, President Clinton stated that the missile strikes were ordered on the basis of "convincing information from a variety of reliable sources" that the bin Laden organization was responsible for the bombings on August 7, 1998, of the two U.S. Embassies. The report continued:

The United States acted in exercise of our inherent right of self-defense consistent with Article 51 of the United Nations Charter. These strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities. These strikes were intended to prevent and deter additional attacks by a clearly identified terrorist threat. The targets were selected

<sup>2</sup> Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, *id.* at 1643.

because they served to facilitate directly the efforts of terrorists specifically identified with attacks on U.S. personnel and facilities and posed a continuing threat to U.S. lives.

. . . .

I directed these actions pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.<sup>3</sup>

At a White House press conference on August 20, 1998, convened by Secretary of State Madeleine Albright and National Security Adviser Samuel R. Berger, Mr. Berger was asked whether the U.S. plan to attack terrorist camps at a time that would maximize deaths constituted a change in the U.S. policy against "assassination." Mr. Berger responded:

Well, I think that term doesn't pertain in this case. I think this was a military target. And I think—in that situation I think it is appropriate, under Article 51 of the U.N. Charter, for protecting the self-defense of the United States, under a 1996 statute in Congress, for us to try to disrupt and destroy those kinds of military terrorist targets.<sup>4</sup>

But unnamed administration officials later stated that the bombings in Afghanistan were timed in the hope that they would kill Osama bin Laden and as many of his lieutenants as possible. Although an executive order bars anyone working for the U.S. Government from plotting or carrying out assassinations, the sources stated that "White House lawyers" concluded that the President has the authority to target the "infrastructure" of terrorist groups attacking U.S. nationals.<sup>5</sup>

The United States also notified the UN Security Council of the missile attacks, stating:

These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organization. That organization has issued a series of blatant warnings that "strikes will continue from everywhere" against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing.

In doing so, the United States has acted pursuant to the right of self-defence confirmed by Article 51 of the Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.<sup>6</sup>

Reports on the numbers of persons killed and injured in the raids varied. According to Sudan's state-run television, ten people were injured in the strike on Sudan, but none

<sup>3</sup> Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, *id.* at 1650 (Aug. 21, 1998).

<sup>4</sup> *Press Briefing on U.S. Strikes in Sudan and Afghanistan* (Aug. 20, 1998) (released by the White House Press Office), available in (<http://secretary.state.gov/www/statements/1998/980820.html>). The U.S. law referred to by Mr. Berger contains a congressional finding that "the President should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §324(4), 110 Stat. 1255 (codified at 22 U.S.C. §2377 notes (West Supp. 1998)).

<sup>5</sup> James Risen, *Bin Laden Was Target of Afghan Raid, U.S. Confirms*, N.Y. TIMES, Nov. 14, 1998, at A3. Executive Order 12,333, provides: "No person employed by or on behalf of the United States Government shall engage in, or conspire to engage in, assassination." Exec. Order No. 12,333, §2.11, 46 Fed. Reg. 59,941, 59,952 (1981).

<sup>6</sup> Letter Dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/780 (1998).

were killed. A spokesman for bin Laden reportedly stated that twenty-eight people were killed in the strike on Afghanistan, while the Taliban reportedly announced that twenty-one people were killed and thirty others injured.<sup>7</sup>

In the aftermath of the missile strikes, unnamed Clinton administration intelligence officials told journalists that the United States had covertly obtained a soil sample from outside the Sudan pharmaceutical plant, which revealed a high concentration of ethyl methylphosphonothionate (Empta), a precursor chemical in the production of VX which has no commercial use. Further, according to the Clinton administration, bin Laden had contributed funds to Sudan's state-owned Military Industrial Corporation, which in turn helped finance the pharmaceutical plant.<sup>8</sup> In a classified briefing to U.S. Senators, senior administration officials also recounted electronic intercepts of telephone conversations from inside the plant that reportedly substantiated its use in chemical weapons production.<sup>9</sup> According to the administration, evidence also pointed to Iraqi assistance in the production of VX in the Sudan, as a means of circumventing UN weapons inspections in Iraq.<sup>10</sup> Finally, with respect to whether other U.S. embassies were targeted by bin Laden, Ugandan officials asserted that the U.S. Embassy in Kampala was also an intended target on August 7, but that the attack was delayed until September, at which point alerted Ugandan officials arrested the plotters. An unnamed Clinton administration official confirmed that the U.S. Embassy in Uganda was on a list of targets compiled by bin Laden.<sup>11</sup>

The Government of Sudan protested the missile strike on Sudan as an "iniquitous act of aggression which is a clear and blatant violation of the sovereignty and territorial integrity of a Member State of the United Nations, and is contrary to international law and practice, the Charter of the United Nations and civilized human behaviour."<sup>12</sup> According to the Government of Sudan, which recalled its diplomats from the United States, the pharmaceutical plant was solely in the business of producing commercial drugs.<sup>13</sup>

A spokesman for the Taliban Islamic movement, which is not recognized by the United Nations as the government of Afghanistan, also protested the missile attacks, as did the Governments of Iran, Iraq, Libya, Pakistan, Russia, and Yemen, Palestinian officials, and certain Islamic militant groups.<sup>14</sup> The Secretariat of the League of Arab States condemned the attack on Sudan as a violation of international law, but was silent as to the

<sup>7</sup> Steven Lee Myers, *U.S. Says Raids Worked and May Stall Attacks*, N.Y. TIMES, Aug. 22, 1998, at A1.

<sup>8</sup> Vernon Loeb & Bradley Graham, *Sudan Plant Was Probed Months Before Attack*, WASH. POST, Sept. 1, 1998, at A1. See also James Risen, *New Evidence Ties Sudanese to Bin Laden, U.S. Asserts*, N.Y. TIMES, Oct. 4, 1998, at 11; Tim Weiner & James Risen, *Decision to Strike Factory in Sudan Based on Surmise*, N.Y. TIMES, Sept. 21, 1998, at A1.

<sup>9</sup> Tim Weiner, *Pentagon and C.I.A. Defend Sudan Missile Attack*, N.Y. TIMES, Sept. 2, 1998, at A5.

<sup>10</sup> Barbara Crossette et al., *U.S. Says Iraq Aided Production of Chemical Weapons in Sudan*, N.Y. TIMES, Aug. 25, 1998, at A1.

<sup>11</sup> Karl Vick, *Embassy in Uganda May Have Been a Target*, WASH. POST, Oct. 6, 1998, at A18.

<sup>12</sup> Letter Dated 21 August 1998 from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/786, annex (1998); see also Letter Dated 24 August 1998 from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/801 (1998); Letter Dated 23 August 1998 from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/793 (1998); Letter Dated 22 August 1998 from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/792 (1998).

<sup>13</sup> See Karl Vick, *Many in Sudan Dispute Plant's Tie with Bomber*, WASH. POST, Oct. 22, 1998, at A29; Tim Weiner & Steven Lee Myers, *Flaws in U.S. Account Raise Questions on Strike in Sudan*, N.Y. TIMES, Aug. 29, 1998, at A1.

<sup>14</sup> Douglas Jehl, *U.S. Raids Provoke Fury in Muslim World*, N.Y. TIMES, Aug. 22, 1998, at A6; Michael Wine, *Russia Is Critical*, *id.*; Edmund L. Andrew, *Backing in Europe*, *id.*; Raymond Bonner, *Muted Criticism and Marches in Pakistan*, N.Y. TIMES, Aug. 22, 1998, at A7; Howard Schneider, *Radical States Assail Act; Allies Muted*, WASH. POST, Aug. 22, 1998, at A15; Howard Schneider & Nora Boustany, *A Barrage of Criticism in the Mideast*, WASH. POST, Aug. 22, 1998, at A20.

attack on Afghanistan.<sup>15</sup> Other states, however, expressed support, or at least understanding, for the attacks, including Australia, France, Germany, Japan, Spain, and the United Kingdom.<sup>16</sup>

In conducting the missile strikes, U.S. defense officials stated that the United States did not request overflight permission from Egypt, Eritrea, or Pakistan.<sup>17</sup> In a letter to the Security Council, Pakistan asserted that the United States' action "entailed a violation of the airspace of Pakistan" and that there should have been prior consultations by the United States with Pakistan.<sup>18</sup>

Sudan, the Group of African States, the Group of Islamic States, and the League of Arab States each requested a meeting of the Security Council to discuss the missile attack on Sudan, as well as the dispatch of a fact-finding mission by the Security Council to investigate the matter (the requests were silent on the attacks against Afghanistan).<sup>19</sup> The incident, however, was not placed on the agenda of the Security Council. The Afghan civil war was discussed at the Security Council on August 28, 1998, leading to the adoption of Security Council Resolution 1193.<sup>20</sup> The resolution was silent as to the U.S. missile attacks, but stated that the Security Council is deeply concerned "at the continuing presence of terrorists in the territory of Afghanistan" and demanded that "the Afghan factions . . . refrain from harbouring and training terrorists and their organizations."<sup>21</sup>

By October 1998, several suspects in the bombings at the U.S. Embassies in Nairobi and Dar es Salaam were arrested and charged in the United States and in Tanzania.<sup>22</sup> On November 4, 1998, a federal grand jury in New York returned a 238-count indictment charging bin Laden and several associates—Muhammad Atef, Wadih el Hage, Fazul Abdullah Mohammed, Mohamed Sadeek Odeh, and Mohamed Rashed Daoud Al-'Owhali—with the bombings and other acts of terrorism against U.S. nationals abroad. The indictment states in part:

1. At all relevant times from in or about 1989 until the date of the filing of this Indictment, an international terrorist group existed which was dedicated to opposing non-Islamic governments with force and violence. This organization grew out of the "mekhtab al khidemat" (the "Services Office") organization which had maintained offices in various parts of the world, including Afghanistan, Pakistan (particularly in Peshawar) and the United States, particularly at the Alkifah Refugee Center in Brooklyn, New York. The group was founded by defendants USAMA BIN LADEN and MUHAMMED ATEF . . . together with "Abu Ubaidah

<sup>15</sup> Letter Dated 21 August 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/789 (1998).

<sup>16</sup> William Drozdiak, *European Allies Back U.S. Strikes: Japan Says It "Understands,"* WASH. POST, Aug. 21, 1998, at A20.

<sup>17</sup> Barton Gellman & Dana Priest, *U.S. Strikes Terrorist-Linked Sites in Afghanistan, Factory in Sudan,* WASH. POST, Aug. 21, 1998, at A1.

<sup>18</sup> Letter Dated 24 August 1998 from the Permanent Representative of Pakistan to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/794 (1998).

<sup>19</sup> Letter Dated 21 August 1998 from the Permanent Representative of the Sudan to the United Nations, *supra* note 12, annex; Letter Dated 25 August 1998 from the Permanent Representative of Namibia to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/802 (1998) (Group of African States request); Letter Dated 21 August 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of Qatar to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/790 (1998) (Group of Islamic States request); Letter Dated 21 August 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/791 (1998) (League of Arab States request).

<sup>20</sup> SC Res. 1193 (Aug. 28, 1998).

<sup>21</sup> *Id.*, preamble & para. 15.

<sup>22</sup> Michael Grunwald, *4 Followers of Bin Laden Indicted in Plot to Kill Americans,* WASH. POST, Oct. 8, 1998, at A2; Benjamin Weiser, *U.S. Says It Can Tie Bin Laden to Embassy Bombings,* N.Y. TIMES, Oct. 8, 1998, at A3; David Johnston, *Charges Against 2d Suspect Detail Trail of Terrorists,* N.Y. TIMES, Aug. 29, 1998, at A4; Raymond Bonner, *Tanzania Charges Two in Bombing of American Embassy,* N.Y. TIMES, Sept. 22, 1998, at A6.

al Bانشiri" and others. From in or about 1989 until the present, the group called itself "al Qaeda" ("the Base"). From 1989 until in or about 1991, the group (hereafter referred to as "al Qaeda") was headquartered in Afghanistan and Peshawar, Pakistan. In or about 1991, the leadership of al Qaeda, including its "emir" (or prince) defendant USAMA BIN LADEN, relocated to the Sudan. Al Qaeda was headquartered in the Sudan from approximately 1991 until approximately 1996 but still maintained offices in various parts of the world. In 1996, defendants USAMA BIN LADEN and MUHAMMED ATEF and other members of the al Qaeda relocated to Afghanistan. At all relevant times, al Qaeda was led by its *emir*, defendant USAMA BIN LADEN. Members of al Qaeda pledged an oath of allegiance (called a "*bayat*") to defendant USAMA BIN LADEN and al Qaeda.

2. Al Qaeda opposed the United States for several reasons. First, the United States was regarded as an "infidel" because it was not governed in a manner consistent with the group's extremist interpretation of Islam. Second, the United States was viewed as providing essential support for other "infidel" governments and institutions, particularly the governments of Saudi Arabia and Egypt, the nation of Israel and the United Nations, which were regarded as enemies of the group. Third, al Qaeda opposed the involvement of the United States armed forces in the Gulf War in 1991 and in Operation Restore Hope in Somalia in 1992 and 1993, which were viewed by al Qaeda as pretextual preparations for an American occupation of Islamic countries. In particular, al Qaeda opposed the continued presence of American military forces in Saudi Arabia (and elsewhere on the Saudi Arabian peninsula) following the Gulf War. Fourth, al Qaeda opposed the United States Government because of the arrest, conviction and imprisonment of persons belonging to al Qaeda or its affiliated terrorist groups, including Sheik Omar Abdel Rahman.

3. One of the principal goals of al Qaeda was to drive the United States armed forces out of Saudi Arabia (and elsewhere on the Saudi Arabian peninsula) and Somalia by violence. Members of al Qaeda issued *fatwahs* (rulings on Islamic law) indicating that such attacks were both proper and necessary.

....

5. Al Qaeda had a command and control structure which included a *majlis al shura* (or consultation council) which discussed and approved major undertakings, including terrorist operations. USAMA BIN LADEN and MUHAMMED ATEF . . . , among others, sat on the *majlis al shura* (or consultation council) of al Qaeda.

....

8. From at least 1991 until the date of the filing of this Indictment, in the Southern District of New York, in Afghanistan, Pakistan, the Sudan, Saudi Arabia, Yemen, Somalia, Kenya, Tanzania, the Philippines and elsewhere out of the jurisdiction of any particular state or district, [bin Laden, Muhammad Atef, Wadih el Hage, Fazul Abdullah Mohammed, Mohamed Sadeek Odeh, and Mohamed Rashed Daoud Al'Owhali], together with other members and associates of al Qaeda and others known and unknown to the Grand Jury, unlawfully, willfully and knowingly combined, conspired, confederated and agreed to kill nationals of the United States in violation of Title 18, United States Code, Section 2332(a).

9. The objectives of the conspiracy included: (i) killing United States nationals employed by the United States military who were serving in Somalia and on the Saudi Arabian peninsula; (ii) killing United States nationals employed at the United States Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania; and (iii) engaging in conduct to conceal the activities and means and methods of the co-conspirators by, among other things, establishing front companies, providing false identity and travel documents, engaging in coded correspondence and providing false information to the authorities in various countries.

....

### *The Bombing in Nairobi*

ar. On August 7, 1998, beginning at approximately 9:30 A.M., the defendant FAZUL ABDULLAH MOHAMMED . . . drove a pick-up truck from the villa located at 43 Rundu Estates to the vicinity of the United States Embassy in Nairobi, Kenya, while the defendant MOHAMED RASHED DAOUD AL-'OWHALI . . . rode in another vehicle containing a large bomb driven by "Azzam" (the "Nairobi Bomb Truck") to the United States Embassy in Nairobi, Kenya. The defendant MOHAMED RASHED DAOUD AL-'OWHALI . . . possessed four stun-grenade type devices, a handgun and keys to the padlocks on the Nairobi Bomb Truck;

as. On August 7, 1998, at approximately 10:30 A.M., the defendant MOHAMED RASHED DAOUD AL-'OWHALI . . . got out of the Nairobi Bomb Truck as it approached the rear of the Embassy building and brandished a stun grenade before throwing it in the direction of a security guard and then seeking to flee;

at. On August 7, 1998, at approximately 10:30 A.M., "Azzam" drove the Nairobi Bomb Truck to the rear of the Embassy building and fired a handgun at the windows of the Embassy building;

au. On August 7, 1998, at approximately 10:30 A.M., "Azzam" detonated the explosive device contained in the Nairobi Bomb Truck at a location near the rear of the Embassy building, demolishing a multi-story secretarial college and severely damaging the United States Embassy building and the Cooperative Bank Building, causing a total of more than 213 deaths, as well as injuries to more than 4,500 people, including citizens of Kenya and the United States;

av. Following the August 7, 1998, bombing of the Embassy building, the defendant MOHAMED RASHED DAOUD AL-'OWHALI . . . sought to secrete bullets and keys to the padlock on the Nairobi Bomb Truck in a hospital clinic in Nairobi;

### *The Dar es Salaam Bombing*

aw. On August 7, 1998, at approximately 10:40 A.M., a co-conspirator detonated an explosive device contained in a vehicle in the vicinity of the United States Embassy building located in Dar es Salaam, Tanzania, severely damaging the United States Embassy building and causing the deaths of at least 11 persons, including Tanzanian citizens, on the Embassy property, as well as injuries to at least 85 people . . .<sup>23</sup>

On the same day the indictment was filed, the Department of State announced a \$5 million reward for information leading to the arrest and conviction of the defendants.<sup>24</sup>

### *Humanitarian Intervention in Kosovo*

The province of Kosovo in the former Yugoslavia contains a mix of about 1.8 million Albanians (who are predominantly Muslims) and two hundred thousand Serbs (who are Eastern Orthodox Christians). Kosovo is a province to which Serbs have strong emotional ties, since many regard it as the cradle of their nation. In 1389, the Osmanlis defeated the

<sup>23</sup> Indictment, *United States v. Usama bin Laden*, S(2) 98 Cr. 1023 (LBS) (S.D.N.Y. Nov. 4, 1998). See Karl Vick, *Assault on a U.S. Embassy: A Plot Both Wide and Deep*, WASH. POST, Nov. 23, 1998, at A1; Benjamin Weiser, *Saudi Is Indicted in Bomb Attacks on U.S. Embassies*, N.Y. TIMES, Nov. 5, 1998, at A1. Even prior to the embassy bombings, bin Laden was indicted under seal by a New York federal grand jury for violent acts directed against the United States and its nationals. Vernon Loeb, *U.S. Jury Indicts Bin Laden on Terrorism Charges*, WASH. POST, Aug. 25, 1998, at A11.

<sup>24</sup> Michael Grunwald & Vernon Loeb, *Charges Filed Against Bin Laden*, WASH. POST, Nov. 5, 1998, at A17. Such rewards are provided for under §36 of the State Department Basic Authorities Act of 1956, 22 U.S.C. §2708, most recently amended by §2202 of the Foreign Affairs Reform and Restructuring Act of 1998, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998), and Pub. L. No. 105-323, 112 Stat. 3029 (1998) (providing rewards for information leading to the arrest or conviction of any individual for the commission of an act, or conspiracy to commit an act, of international terrorism, narcotics-related offenses, or for serious violations of international humanitarian law relating to the former Yugoslavia, or for other purposes).

Serbs at the Battle of Kosovo Polje, leading to the northward migration of many Serbs and to Ottoman rule over Serbia for more than four hundred years. Within the Socialist Federal Republic of Yugoslavia (SFRY), Kosovo enjoyed political autonomy until 1989. During the process of the breakup of the SFRY, the Serb-dominated Government of the Federal Republic of Yugoslavia (Serbia-Montenegro) (FRY) terminated Kosovo's autonomy and moved to suppress Albanian language and cultural institutions in Kosovo.<sup>1</sup>

The Kosovo Liberation Army (KLA), a guerrilla movement of a few hundred ethnic Albanians seeking to expel Serbian authorities and establish an independent state of Kosovo, sporadically attacked Serbian police and civilians in Kosovo during 1997-1998. In response, FRY police and military forces, beginning in late February 1998, violently cracked down on the KLA, as well as on ethnic Albanians who the Serbs claimed were sympathetic civilians. By mid-1998, a large number of villages had been damaged or destroyed, hundreds of civilians had been killed, and more than two hundred thousand civilians displaced from their homes, with some fleeing the country (to Albania and Macedonia), but with the vast majority remaining in Kosovo. On October 3, 1998, UN Secretary-General Kofi Annan reported to the Security Council:

Fighting in Kosovo has resulted in a mass displacement of civilian populations, the extensive destruction of villages and means of livelihood and the deep trauma and despair of displaced populations. Many villages have been destroyed by shelling and burning following operations conducted by federal and Serbian government forces. There are concerns that the disproportionate use of force and actions of the security forces are designed to terrorize and subjugate the population, a collective punishment to teach them that the price of supporting the Kosovo Albanian paramilitary units is too high and will be even higher in the future. The Serbian security forces have demanded the surrender of weapons and have been reported to use terror and violence against civilians to force people to flee their homes or the places where they had sought refuge, under the guise of separating them from fighters of the Kosovo Albanian paramilitary units.<sup>2</sup>

On September 23, 1998, the Security Council affirmed that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region and demanded that all parties to the conflict immediately cease hostilities. Moreover, the Security Council demanded that the FRY cease all action by its security forces affecting the civilian population and, under international monitoring, order "the withdrawal of its security units used for civilian repression." Finally, the Security Council demanded that the FRY and the Kosovo Albanian leadership immediately enter into a meaningful dialogue with a clear timetable for achieving a negotiated political solution to the crisis.<sup>3</sup>

On September 26, the FRY announced the end of its military offensive in Kosovo, but observers continued to witness FRY attacks, including massacres in villages west of Pristina clearly intended to intimidate the civilian population.<sup>4</sup> Outrage at this violence led several countries to call for military air strikes in Kosovo against FRY military units and installations, unless Yugoslav President Slobodan Milošević complied with the Security Council's demands. The FRY ordered tanks and other heavy armor in Kosovo to return to their garrisons, placed thousands of security troops on leave, and withdrew its

<sup>1</sup> See generally NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* (1998); Tim Judah, *Impasse in Kosovo*, N.Y. REV. BOOKS, Oct. 8, 1998, at 4; *Background: The Kosovo Crisis*, WASH. POST, Oct. 11, 1998, at A39.

<sup>2</sup> Report of the Secretary-General prepared pursuant to resolutions 1160 (1998) and 1199 (1998) of the Security Council, para. 7, UN Doc. S/1998/912 (1998). See also Reports of the Secretary-General prepared pursuant to resolution 1160 (1998) of the Security Council, UN Docs. S/1998/834 (1998), S/1998/712 (1998), and S/1998/608 (1998).

<sup>3</sup> SC Res. 1199 (Sept. 23, 1998).

<sup>4</sup> Jane Perlez, *Massacres by Serbian Forces in 3 Kosovo Villages*, N.Y. TIMES, Sept. 30, 1998, at A1; Jane Perlez, *Another Kosovo Village, Burned Down by Serbs*, N.Y. TIMES, Sept. 28, 1998, at A3.



forces from some parts of Kosovo. The withdrawals, however, were not regarded as fully in compliance with the requirements of SC Resolution 1199.<sup>5</sup>

When Russia announced that it would veto any effort to have the Security Council authorize such air strikes, attention shifted to obtaining a consensus within the North Atlantic Treaty Organization (NATO).<sup>6</sup> NATO had been actively involved since 1995 in maintaining peace and security in Bosnia, Serbia's next-door neighbor.

A United States special envoy, Richard C. Holbrooke, was dispatched to Belgrade to meet with President Milošević. Over a period of eight days, Mr. Holbrooke and President Milošević discussed the means for full FRY compliance with Resolution 1199. When the talks appeared stalled, on October 13, NATO's decision-making body, the North Atlantic Council (NAC), approved an "activation order" authorizing NATO's military commander to conduct limited air strikes and an air campaign in the FRY no earlier than ninety-six hours after issuance of the order.<sup>7</sup> The activation order was the first time in its history that NATO authorized the use of force against a country due to internal repression. Moreover, since such use of force was against a country that was not a member of NATO, and was taken without explicit UN approval, the question of the legal authority for NATO's action was extensively debated within NATO. Some European states apparently justified proceeding without explicit UN approval because of the unique humanitarian crisis in Kosovo, while Mr. Holbrooke was more broadly quoted as saying that "NATO has now shown it is willing to take military action in areas where it was not involved before and that it does not have to seek explicit authority from the United Nations Security Council to do so."<sup>8</sup>

On the same day the NATO activation order was issued, President Milošević concluded an agreement with Mr. Holbrooke for the purpose of compliance with Resolution 1199. The agreement provided for verification of the withdrawal of FRY military forces, from the air by NATO and from the ground by two thousand observers of the Organization for Security and Co-operation in Europe (OSCE); monitoring by the OSCE observers of relief groups assisting Albanian Kosovar refugees and of elections to be held in Kosovo; and setting up of a political framework for addressing Kosovo's future.<sup>9</sup>

On October 15, 1998, NATO signed an agreement with the FRY providing for the establishment of the air verification mission over Kosovo.<sup>10</sup> On October 16, the OSCE signed an agreement with the FRY governing the terms of the OSCE deployment to

<sup>5</sup> Jane Perlez, *Milosevic Says He Has Met NATO Demands on Kosovo*, N.Y. TIMES, Oct. 8, 1998, at A14; R. Jeffrey Smith, *Yugoslavia Trims Kosovo Presence*, WASH. POST, Oct. 4, 1998, at A29.

<sup>6</sup> Celestine Bohlen, *Russia Vows to Block the U.N. From Backing Attack on Serbs*, N.Y. TIMES, Oct. 7, 1998, at A8. On October 8, 1998, the United States announced that it would vote within NATO in favor of air strikes. Steven Lee Myers & Steven Erlanger, *U.S. to Back NATO Military Action Against Serbs in Kosovo*, N.Y. TIMES, Oct. 8, 1998, at A14.

<sup>7</sup> See Statement to the Press by the Secretary General, NATO Press Release (Oct. 13, 1998), available in <http://www/nato/int/docu/speech/1998/s981013a.htm>. See also Roger Cohen, *NATO Opens Way to Start Bombing in Serb Province*, N.Y. TIMES, Oct. 13, 1998, at A1; William Drozdiak, *NATO Approves Airstrikes on Yugoslavia*, WASH. POST, Oct. 13, 1998, at A1.

<sup>8</sup> William Drozdiak, *U.S., European Allies Divided Over NATO's Authority to Act*, WASH. POST, Nov. 8, 1998, at A33.

<sup>9</sup> Letter Dated 14 October 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/953 (1998); Letter Dated 15 October 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/955 (1998). See also Jane Perlez, *Milosevic Accepts Kosovo Monitors, Averting Attack*, N.Y. TIMES, Oct. 14, 1998, at A1.

<sup>10</sup> Letter Dated 22 October 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/991 (1998).

Kosovo.<sup>11</sup> On October 24, 1998, the Security Council endorsed these agreements and demanded that the FRY fully and promptly comply with them.<sup>12</sup>

By the end of NATO's ninety-six-hour deadline, FRY forces had not yet withdrawn fully from Kosovo. Consequently, NATO extended the deadline for another ten days to provide the FRY with sufficient time to comply.<sup>13</sup> At the end of that deadline, many, but not all, FRY forces had withdrawn. Based on the FRY's "substantial compliance" with the Security Council's resolutions, NATO voted on October 27 to extend the deadline indefinitely, thereby technically leaving the NATO activation order in place, but suspended.<sup>14</sup> After the intervention by NATO, the strength of the Kosovo rebels began to resurge and a low level of violence continued. By year's end the likelihood of further armed conflict in Kosovo between the rebels and Serb authorities seemed high.<sup>15</sup>

#### PEACEFUL SETTLEMENT OF DISPUTES

##### *Execution of Paraguayan National Who Was Not Notified of Right to Consular Access*

On April 3, 1998, the Government of Paraguay instituted proceedings against the United States at the International Court of Justice for violations of the Vienna Convention on Consular Relations (Vienna Convention). According to Paraguay, the United States failed under Article 36 of the Convention to advise "without delay" a Paraguayan national of his right to consular assistance after his arrest in Virginia. The Paraguayan national, Angel Francisco Breard, was arrested on suspicion of murder on September 1, 1992, and, after a trial, was convicted. On August 22, 1993, Breard was sentenced to death. Efforts in the United States to appeal the conviction and sentence by both Breard and the Government of Paraguay were unsuccessful, leading to the filing of the case before the International Court of Justice, as well as a request for the indication of provisional measures, just days before Breard's scheduled execution.<sup>1</sup>

The International Court convened a hearing on April 7, 1998, regarding Paraguay's request for the indication of provisional measures. At that hearing, the U.S. Department of State Legal Adviser, David R. Andrews, stated:

1.6. As this Court knows, the indication of provisional measures is a serious matter which the Court is cautious in exercising. That is especially true in this case, where the Court is being asked to take action that would severely intrude upon the national criminal jurisdiction of a State in a matter of violent crime. Under the Court's jurisprudence, an applicant may only obtain the indication of provisional measures of protection in narrowly-defined circumstances, which the United States submits do not exist here.

1.7. The United States principal submission to the Court is that Paraguay has no legal[ly] recognizable claim to the relief it seeks and, for that reason, there is no prima facie basis for jurisdiction for the Court in this case, nor any prospect for Paraguay ultimately to prevail on the merits. Consequently, and in accordance with its jurisprudence, this Court should not indicate provisional measures of protection as requested by Paraguay.

<sup>11</sup> Letter Dated 19 October 1998 from the Permanent Representative of Poland to the United Nations Addressed to the Secretary-General, UN Doc. S/1998/978; see also Letter Dated 26 October 1998 from the Permanent Representative of Poland Addressed to the President of the Security Council, UN Doc. S/1998/994.

<sup>12</sup> SC Res. 1203 (Oct. 24, 1998). The vote was 13 in favor, with 2 abstentions (China and Russia).

<sup>13</sup> William Drozdiak, *NATO Extends Kosovo Deadline*, WASH. POST, Oct. 17, 1998, at A16.

<sup>14</sup> Steven Lee Myers, *Serbian Pullouts Lead NATO to Lift Threat of Attack*, N.Y. TIMES, Oct. 28, 1998, at A1.

<sup>15</sup> R. Jeffrey Smith, *A Turnaround in Kosovo: Rebels Bounce Back as NATO Threats Drive Army Out*, WASH. POST, Nov. 18, 1998, at A1.

<sup>1</sup> For further background, see *Agora: Breard*, 92 AJIL 666 (1998); International Decisions, 92 AJIL at 517 and 87; and Contemporary Practice of the United States, 92 AJIL at 243.

1.8. Paraguay has no legally recognizable claim because Paraguay has no right under the Vienna Convention to have Mr. Breard's conviction and sentence voided. Paraguay in effect asks that this Court grant Mr. Breard a new trial—a right which would then presumably accrue to any other person similarly situated in the United States or in any other State which is a party to the Vienna Convention. The United States will show in these proceedings that this is not the consequence of a lack of notification under the Vienna Convention. The Court should not accept Paraguay's invitation to rewrite the Convention and to become a supreme court of criminal appeals.<sup>2</sup>

The U.S. Department of State Assistant Legal Adviser for Consular Affairs, Catherine Brown, informed the Court that the United States had surveyed governments worldwide on state practice regarding such notification and on remedies when notification was not made.

2.13. Practice with respect to notification: Compliance with respect to the obligation to notify the detainee of the right to see a consul in fact varies widely. At one end of the spectrum, some countries seem to comply unfailingly. At the other end, a small number seem not to comply at all. Rates of compliance seem partly to be a function of such factors as whether a country is large or small, whether it has a unitary or federal organization, the sophistication of its internal communication systems, and the way in which the country has chosen to implement the obligation. Countries have chosen to implement the obligation in different ways, including by providing only oral guidance, by issuing internal directives, and by enacting implementing legislation. Some apparently provide no guidance at all.

2.14. If a detainee requests consular notification or communication, actual notification to a consul may take some time. It may be provided by telephone, but sometimes a letter or a diplomatic note is sent. As a result there may be a significant delay before notification is received and, consequently, critical events in a criminal proceeding may have already occurred before a consul is aware of the detention. And, as noted previously, the consul may then respond in a variety of ways. For these reasons, and because of the wide variation in compliance with the consular notification requirement, it is quite likely that few, if any, states would have agreed to Article 36 if they had understood that a failure to comply with consular notification would require undoing the results of their criminal justice systems.

2.15. Practice with respect to remedies: Let me turn now to what our inquiries revealed about state practice with respect to remedies. Typically when a consular officer learns of a failure of notification, a diplomatic communication is sent protesting the failure. While such correspondence sometimes goes unanswered, more often it is investigated either by the foreign ministry or the involved law enforcement officials. If it is learned that notification in fact was not given, it is common practice for the host government to apologize and to undertake to ensure improved future compliance. We are not aware of any practice of attempting to ascertain whether the failure of notification prejudiced the foreign national in criminal proceedings. This lack of practice is consistent with the fact and common international understanding that consular assistance is not essential to the criminal proceedings against a foreign national.

2.16. Notwithstanding this practice, Paraguay asks that the entire judicial process of the State of Virginia—Mr. Breard's trial, his sentence, and all of the subsequent appeals, which I will review momentarily—be set aside and that he be restored to the position he was in at the time of his arrest because of the failure of notification. Roughly 165 States are parties to the Vienna Convention. Paraguay has not identified one that provides such a *status quo ante* remedy of vacating a criminal conviction for a failure of consular notification. Neither has Paraguay identified any country

<sup>2</sup> International Court of Justice Verbatim Record, Vienna Convention on Consular Relations (Para. v. U.S.), Hearing on Request for Provisional Measures, ICJ Doc. CR 98/7, at 25–26 (Apr. 7, 1998).

that has an established judicial remedy whereby a foreign government can seek to undo a conviction in its domestic courts based on a failure of notification.<sup>3</sup>

On April 9, 1998, the International Court issued an Order stating that the "United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order."<sup>4</sup> On April 13, 1998, U.S. Secretary of State Madeleine Albright wrote to the Governor of Virginia, James S. Gilmore, requesting that he stay the execution of Mr. Breard since the "execution of Mr. Breard in the face of the Court's April 9 action could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad."<sup>5</sup>

On the same day, the U.S. Department of Justice, in conjunction with the U.S. Department of State, filed an amicus brief regarding the petitions for a writ of certiorari filed by Paraguay and by Breard at the U.S. Supreme Court. In its brief, the United States urged the Supreme Court to deny the petitions, on the grounds that the petitioners had identified no basis for the Supreme Court to vacate a state criminal conviction. With respect to the Court's Order of Provisional Measures, the amicus brief noted that the Secretary of State had requested that the Governor of Virginia stay Breard's execution and stated in part:

A. [S]tays of execution in capital cases are subject in general to the same standards as those governing stays in other cases. There must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari; there must [be] a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed. . . .

B. As to the merits, we have explained above why respondents' various claims fail; we believe the law is sufficiently clear that a stay would not be warranted. Our view of the merits is not changed by the recent order of the ICJ. The indication of provisional measures by the ICJ does not represent even tentative agreement with the merits of Paraguay's argument to that court that the Vienna Convention provides a remedy of vacatur of a criminal conviction. The indication of provisional measures is, therefore, significantly different from a grant of a preliminary injunction or application for a stay familiar to the Court under U.S. law. The ICJ's order notes, in fact, that "the existence of relief sought by Paraguay under the Convention can only be determined at the stage of the merits," 97-8214 Supplemental Brief in Support of Application for a Stay of Execution, Exh. C, ¶33, and that "measures indicated by the [ICJ] for a stay of execution would necessarily be provisional in nature and would not in any way prejudge the findings the Court might make on the merits," *id.* ¶40.

C. As to the balance of hardships, there can be no doubt of the irreparable harm to Breard from the carrying out of his sentence of execution; but that irreparable harm, in and of itself, cannot warrant a stay of execution in the absence of a reasonably persuasive showing on the merits (unless every application for a stay of execution were to be granted). And, of course, the State of Virginia would be harmed by an order preventing it from carrying out its lawfully entered judgment of execution in a timely fashion, despite the fact that the sentence complies with

<sup>3</sup> *Id.* at 31-32.

<sup>4</sup> Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 ICJ REP. 11 (Order of Apr. 9), reprinted in 37 ILM 810 (1998).

<sup>5</sup> Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), partially reprinted in 92 AJIL 671-72 (1998).

constitutional requirements and that the arguments presented in these cases about the Vienna Convention provide no basis for relief.

D. As to the public interest, petitioners contend that this Court should stay the execution, either as a matter of comity or (they argue) because the ICJ's order is binding. Concerning the issue of comity, we emphasize again that the Secretary of State is requesting that the Governor of Virginia stay Breard's execution. There is little prospect, therefore, that the international community will view the United States government's response to the ICJ's order as indicating disrespect to that court's processes.

As to the purportedly binding effect of the ICJ's order, there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding. See *Restatement (Third) of the Foreign Relations Law of the United States* §903, Reporter's Note 6, at 369-370 (1986). The better reasoned position is that such an order is not binding. Article 41(1) of the ICJ statute provides that the ICJ shall have "the power to *indicate* any provisional measures which *ought to be taken* to preserve the respective rights of either power." Article 41(2) further states that, "[p]ending the final decision [of the ICJ], notice of the measures *suggested* shall forthwith be given to the parties and the Security Council." The use of precatory language ("indicate," "ought to be taken," "suggested") instead of stronger language (e.g.: the ICJ may "order" provisional measures that "shall" be taken) strongly supports a conclusion that ICJ provisional measures are not binding on the parties. The distinction in Article 41(2) between the "final decision" ultimately foreseen and the "measures suggested" in the interim also suggests that the "measures suggested" are not binding.

Petitioners have relied on the United Nations Charter to argue that provisional measures are binding, but the language of the Charter does not support that conclusion. Article 94(1) provides that "[e]ach member \* \* \* undertakes to comply with the *decision* of the [ICJ] in any case to which it is a party." (Emphasis added.) "The decision," in the context of Article 94(1) of the Charter, evidently refers to the final decision of the International Court. Article 94(2) of the Charter elaborates that "[i]f any party to a case fails to perform the obligations incumbent upon it by a *judgment* rendered by the [ICJ], the other party may have recourse to the Security Council." (Emphasis added.) Significantly, the Security Council has never acted to enforce provisional measures indicated by the ICJ. See *Restatement, supra*, at 368 (discussing Security Council's response to ICJ's order indicating provisional measures in dispute between United Kingdom and Iran).

Moreover, the ICJ itself has never concluded that provisional measures are binding on the parties to a dispute. That court has indicated provisional measures in seven other cases of which we are aware; in most of those cases, the order indicating provisional measures was not regarded as binding by the respondent. See *Restatement, supra*, at 368-369 (discussing *Australia and New Zealand v. France*, 1975 I.C.J. 99, 106; *United States v. Iran*, 1979 I.C.J. 20-21; *Nicaragua v. United States*, 1984 I.C.J. 392, 422, and *United Kingdom v. Iran*, 1951 I.C.J. 89, 93-94); see also 1972 I.C.J. 17 (indicating provisional measures in *United Kingdom v. Iceland*). The ICJ did not, in any of the final decisions in those cases, suggest that the failure of the respondent to comply with the indication of provisional measures had violated the court's earlier order.

Finally, even if parties to a case before the ICJ are required to heed an order of that court indicating provisional measures, the ICJ's order in this case does not require *this Court* to stop Breard's execution. That order states that the United States "should" take all measures "at its disposal" to ensure that Breard is not executed. The word "should" in the ICJ's order confirms our understanding, described above, that the ICJ order is precatory rather than mandatory. But in any event, the "measures at [the government's] disposal" are a matter of domestic United States law, and our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The "measures at [the

United States'] disposal" under our Constitution may in some cases include only persuasion—such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution—and not legal compulsion through the judicial system. That is the situation here. Accordingly, the ICJ's order does not provide an independent basis for this Court either to grant certiorari or to stay the execution.<sup>6</sup>

On April 14, 1998, the Supreme Court denied the petitions for certiorari.<sup>7</sup> Late on that day, the Governor of Virginia decided not to stay the execution and Mr. Breard was executed.<sup>8</sup>

On June 9, 1998, the International Court ordered Paraguay to file its Memorial by October 9, 1998, and the United States to file its Counter-Memorial by April 9, 1999. Paraguay filed its Memorial on October 9. On November 2, 1998, however, Paraguay informed the Court that it did not wish to continue the proceedings and requested that the case be removed from the Court's docket. On November 3, the United States informed the Court that it did not oppose Paraguay's request. Accordingly, on November 10, the Court directed that the case be removed from its list of pending cases.

In the course of its presentation to the Court, the United States referred to instructions it had issued in January 1998 to law enforcement officials in the United States to educate them about consular notification and access. Those instructions are contained in a booklet that the Department of State expects to update every two to five years.<sup>9</sup>

#### *U.S.-UK Proposal for Lockerbie Bombing Trial in the Netherlands*

On December 21, 1988, Pan Am Flight 103, en route from London to New York, exploded over Lockerbie, Scotland, resulting in the deaths of 270 persons, 189 of whom were U.S. nationals. Three years later, two Libyans—Abdel Basset al-Megrahi and Lamen Khalifa Fhimman—were indicted in both the United States and the United Kingdom for their alleged participation in placing a bomb on board the aircraft. The United States and the United Kingdom asked Libya to surrender the two Libyan nationals for trial in either the United States or the United Kingdom; Libya refused to do so, and instead asked the two countries for the evidence on which the indictments were based.<sup>1</sup>

During 1992–1993, the UN Security Council passed three resolutions, first asking and then demanding that the Libyan Government surrender the two suspects for trial in either the United Kingdom or the United States, and imposing economic sanctions on Libya to compel compliance.<sup>2</sup> Nonetheless, the Libyan Government repeatedly refused to comply, and instead, on March 3, 1992, filed two cases before the International Court of Justice against the United States and the United Kingdom, respectively, alleging

<sup>6</sup> Brief for the United States as Amicus Curiae at 46–51, *Breard v. Greene*, 118 S.Ct. 1352 (1998) (Nos. 97-1390, 97-8214) (footnote omitted).

<sup>7</sup> *Breard v. Greene*, 118 S.Ct. 1352 (1998).

<sup>8</sup> Commonwealth of Virginia, Office of the Governor, Press Office, Statement by Governor Jim Gilmore concerning the Execution of Angel Breard (Apr. 14, 1998), reprinted in 92 AJIL 674–75 (1998).

<sup>9</sup> U.S. DEPT. OF STATE, PUB. NO. 10518, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM (1998).

<sup>1</sup> Separately, several families of the victims of Pan Am Flight 103 have sued the Government of Libya for civil damages in U.S. courts. *Rein v. Libya*, 995 F.Supp. 325 (E.D.N.Y. 1998), *aff'd*, No. 98-7467 (2d Cir. Dec. 15, 1998) (denying defendants' motion to dismiss action, in light of recent amendment to Foreign Sovereign Immunities Act creating exemption from immunity for states designated as sponsors of terrorism). See also *Smith v. Libya*, 886 F.Supp. 306 (E.D.N.Y. 1995), *aff'd*, 101 F.3d 239 (2d Cir. 1997), *cert. denied*, 117 S.Ct. 1569 (1997) (as part of initial effort of families to sue, finding no implied waiver of sovereign immunity by Libya).

<sup>2</sup> SC Res. 731, UN SCOR, 47th Sess., Res. & Dec., at 51, UN Doc. S/INF/48 (1992); SC Res. 748, *id.* at 52; SC Res. 883, UN SCOR, 48th Sess., Res. & Dec., at 113, UN Doc. S/INF/49 (1993).

violations by those states of Libya's rights under the Montreal Convention.<sup>3</sup> Libya was unsuccessful in obtaining an indication of provisional measures from the Court.<sup>4</sup> In a subsequent phase, however, Libya was successful in convincing the Court that the cases should not be dismissed for lack of jurisdiction.<sup>5</sup>

As time passed without resolution of the matter, support for the economic sanctions against Libya began to erode. Proposals by Libya and by regional organizations, such as the Arab League, suggested a trial of the two suspects by international, or perhaps Scottish, judges sitting in the Netherlands. Initially, however, the United States and the United Kingdom rejected such proposals, and called upon Libya simply to comply with the Security Council's resolutions.<sup>6</sup>

In a letter addressed to the UN Secretary-General dated August 24, 1998, the Acting Permanent Representatives of the United Kingdom and the United States proposed an arrangement for a trial in the Netherlands by Scottish judges. After noting prior assurances that had been given regarding the fairness of a trial in their jurisdictions and their "profound concern" at Libya's disregard of the Security Council's demands, the two Governments stated:

3. Nevertheless, in the interest of resolving this situation in a way which will allow justice to be done, our Governments are prepared, as an exceptional measure, to arrange for the two accused to be tried before a Scottish court sitting in the Netherlands. After close consultation with the Government of the Kingdom of the Netherlands, we are pleased to confirm that the Government of the Netherlands has agreed to facilitate arrangements for such a court. It would be a Scottish court and would follow normal Scots law and procedure in every respect, except for the replacement of the jury by a panel of three Scottish High Court judges. The Scottish rules of evidence and procedure, and all the guarantees of fair trial provided by the law of Scotland, would apply. Arrangements would be made for international observers to attend the trial. Attached is the text of the intended agreement between the Government of the Netherlands and the Government of the United Kingdom (annex I).

4. The two accused will have safe passage from the Libyan Arab Jamahiriya to the Netherlands for the purpose of the trial. While they are in the Netherlands for the purpose of the trial, we shall not seek their transfer to any jurisdiction other than the Scottish court sitting in the Netherlands. If found guilty, the two accused will serve their sentence in the United Kingdom. If acquitted, or in the event of the prosecution being discontinued by any process of law preventing any further trial under Scots law, the two accused will have safe passage back to the Libyan Arab Jamahiriya. Should other offences committed prior to arrival in the Netherlands come to light during the course of the trial, neither of the two accused nor any other person attending the court, including witnesses, will be liable for arrest for such offences while in the Netherlands for the purpose of the trial.

5. The two accused will enjoy the protection afforded by Scottish law. They will be able to choose Scottish solicitors and advocates to represent them at all stages of the proceedings. The proceedings will be interpreted into Arabic in the same way as a trial held in Scotland. The accused will be given proper medical attention. If they

<sup>3</sup> Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 564.

<sup>4</sup> Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK), Provisional Measures, 1992 ICJ REP. 3 (Order of Apr. 14), and (Libya v. U.S.), Provisional Measures, 1992 ICJ REP. 114 (Order of Apr. 14).

<sup>5</sup> See Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK), Preliminary Objections (Judgment of Feb. 27, 1998), and (Libya v. U.S.), Preliminary Objections (Judgment of Feb. 27, 1998), *reprinted in* 37 ILM 587 (1998), and *summarized in* 92 AJIL 503 (1998).

<sup>6</sup> See Steven Erlanger, *U.S. to Ask Wider Libya Ban if Trial Is Refused*, N.Y. TIMES, Aug. 25, 1998, at A9.

wish, they can be visited in custody by the international observers. The trial would of course be held in public, adequate provision being made for the media.

6. Our two Governments are prepared to support a further Security Council resolution for the purpose of the initiative (which would also suspend sanctions upon the appearance of the two accused in the Netherlands for the purpose of trial before the Scottish court) and which would require all States to cooperate to that end. Once that resolution is adopted, the Government of the United Kingdom will legislate to enable a Scottish court to hold a trial in the Netherlands. The necessary United Kingdom legislation has already been prepared and is attached (annex II).

7. This initiative represents a sincere attempt by the Governments of the United Kingdom and the United States to resolve this issue, and is an approach which has recently been endorsed by others, including the Organization of African Unity, the League of Arab States, the Movement of Non-Aligned States and the Organization of the Islamic Conference (S/1994/373, S/1995/834, S/1997/35, S/1997/273, S/1997/406, S/1997/497, S/1997/529). We are only willing to proceed in this exceptional way on the basis of the terms set out in the present letter (and its annexes), and provided that the Libyan Arab Jamahiriya cooperates fully by:

- (a) Ensuring the timely appearance of the two accused in the Netherlands for trial before the Scottish court;
- (b) Ensuring the production of evidence, including the presence of witnesses before the court;
- (c) Complying fully with all the requirements of the Security Council resolutions.

8. We trust that the Libyan Arab Jamahiriya will respond promptly, positively and unequivocally by ensuring the timely appearance of the two accused in the Netherlands for trial before the Scottish court. If it does not do so, our two Governments reserve the right to propose further sanctions at the time of the next Security Council review. They also reserve the right to withdraw this initiative.

9. We have the honour to request that you convey the text of the present letter and its annexes to the Government of the Libyan Arab Jamahiriya. We would be grateful if you would agree to give the Libyan Arab Jamahiriya any assistance it might require with the physical arrangements for the transfer of the two accused directly to the Netherlands.<sup>7</sup>

Annexed to the letter is the proposed UK legislation. Among other things, the legislation outlines how the proceedings are to be initiated, the constitution of the Scottish court, its authority over witnesses, what the procedures are if the court's decision is appealed, and the rights of those confined during the proceedings.

Also annexed to the letter is the proposed agreement between the Netherlands and the United Kingdom. Among other things, the proposed agreement limits the jurisdiction of the Scottish court to the particular trial; deems inapplicable to the trial regulations of the Netherlands that are inconsistent with regulations of the Scottish court; exempts the Scottish court from all direct taxes; grants the judges and officials of the Scottish court the privileges and immunities accorded to diplomatic agents in accordance with the Vienna Convention;<sup>8</sup> and states that all costs related to the establishment of the court in the Netherlands shall be borne by the United Kingdom.

On August 24, 1998, Secretary of State Madeleine Albright released a statement in which she declared:

<sup>7</sup> Letter Dated 24 August 1998 from the Acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General, UN Doc. S/1998/795 (1998).

<sup>8</sup> Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, 500 UNTS 95.



It has been a decade since Pan Am flight 103 exploded over Lockerbie, Scotland, killing all 259 people aboard and 11 others on the ground. From the outset, America's goal and that of the United Kingdom has been to apprehend and bring before the bar of justice those responsible for this cowardly act of mass murder.

. . . .

Unfortunately, year after year has passed without resolution. The sanctions have not altered Libyan intransigence. The families of the victims have become increasingly and understandably frustrated. The cause of justice was not being served.

Accordingly, the United States and the United Kingdom began exploring whether it might be possible for a Scottish court to hold a trial presided over by Scottish judges outside Scotland. This step is fully consistent with UN Security Council resolutions, and has been suggested to us as a way to call the Libyan Government's bluff to bring the fugitives into court at long last.

. . . .

We note that Libya has repeatedly stated its readiness to deliver the suspects for trial by a Scottish court sitting in a third country. This approach has been endorsed by the Arab League, the Organization of African Unity, the Organization of the Islamic Conference and the Non-Aligned Movement. We now challenge Libya to turn promises into deeds. The suspects should be surrendered for trial promptly. We call upon the members of organizations that have endorsed this approach to urge Libya to end its ten years of evasion now.

Let me be clear—the plan the US and the UK are putting forward is a “take-it-or-leave-it” proposition. It is not subject to negotiation or change, nor should it be subject to additional foot-dragging or delay. We are ready to begin such a trial as soon as Libya turns over the suspects.<sup>9</sup>

The Secretary-General of the United Nations also issued a press release on August 24 announcing:

Over the past few months, the Secretary-General has been following this issue very closely and has been in contact with all three Governments involved, as well as other interested parties. He is extremely pleased about today's announcement and hopes that all sides will cooperate in order to reach an early resolution of this long-standing issue. The Secretary-General is also grateful to the Government of the Netherlands for its willingness to assist in this matter.<sup>10</sup>

As mentioned in paragraph 6 of their letter, the United States and the United Kingdom sought Security Council endorsement of their proposal and, to that end, circulated a draft Security Council resolution. In a letter to the Security Council on August 25, 1998, Libya stated:

1. Libya is anxious to arrive at a settlement of this dispute and to turn over a new page in its relations with the States concerned.

2. Libya's judicial authorities need to have sufficient time to study [the proposal] and to request the assistance of international experts more familiar with the laws of the States mentioned in the documents.

3. We are absolutely convinced that the Secretary-General of the United Nations, Mr. Kofi Annan, must be given sufficient time to achieve what the Security Council has asked of him, so that any issue or difficulty that might delay the desired settlement can be resolved.

<sup>9</sup> Secretary of State Madeleine K. Albright, *Statement on Venue for Trial of Pan Am #103 Bombing Suspects* (Aug. 24, 1998), available in (<http://secretary.state.gov/www/statements/1998/980824a.html>).

<sup>10</sup> Secretary-General Says He is Pleased With United States/United Kingdom Decision on Trial of Libyan Lockerbie Bombing Suspects, UN Doc. SG/SM/6682 (1998).

As a result, we request the following:

That a decision on the draft resolution presented to the Security Council be postponed until Libya's judicial authorities have completed their study of the above-mentioned documents and until the Secretary-General of the United Nations has played the role entrusted to him, in order to arrive at practical solutions that can be applied by the different parties, thereby ensuring that the two suspects appear in court in a neutral third country as soon as possible.

In this connection, Libya reiterates its consistent, documented positions to you, the purpose of this request being to confirm that Libya seriously wishes to arrive at a solution and to resolve any complication that might arise.<sup>11</sup>

Nonetheless, the Security Council passed a resolution on the matter on August 27, 1998. The resolution stated in part that the Security Council:

1. *Demands once again* that the Libyan Government immediately comply with the above-mentioned resolutions [731 (1992), 748 (1992), and 883 (1993)];

2. *Welcomes* the initiative for the trial of the two persons charged with the bombing of Pan Am flight 103 ("the two accused") before a Scottish court sitting in the Netherlands, as contained in the letter dated 24 August 1998 from the Acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and of the United States of America ("the initiative") and its attachments, and the willingness of the Government of the Netherlands to cooperate in the implementation of the initiative;

. . . .

4. *Decides* that all States shall cooperate to this end, and in particular that the Libyan Government shall ensure the appearance in the Netherlands of the two accused for the purpose of trial by the court described in paragraph 2, and that the Libyan Government shall ensure that any evidence or witnesses in Libya are, upon the request of the court, promptly made available at the court in the Netherlands for the purpose of the trial;

5. *Requests* the Secretary-General, after consultation with the Government of the Netherlands, to assist the Libyan Government with the physical arrangements for the safe transfer of the two accused from Libya direct to the Netherlands;

6. *Invites* the Secretary-General to nominate international observers to attend the trial;

7. *Decides further* that, on the arrival of the two accused in the Netherlands, the Government of the Netherlands shall detain the two accused pending their transfer for the purpose of trial before the court described in paragraph 2;

8. *Reaffirms* that the measures set forth in its resolutions 748 (1992) and 883 (1993) remain in effect and binding on all Member States, and in this context reaffirms the provisions of paragraph 16 of resolution 883 (1993), and *decides* that the aforementioned measures shall be suspended immediately if the Secretary-General reports to the Council that the two accused have arrived in the Netherlands for the purpose of trial before the court described in paragraph 2 or have appeared for trial before an appropriate court in the United Kingdom or the United States, and that the Libyan Government has satisfied the French judicial authorities with regard to the bombing of UTA 772;

<sup>11</sup> Letter Dated 25 August 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/803 (1998).

9. *Expresses* its intention to consider additional measures if the two accused have not arrived or appeared for trial promptly in accordance with paragraph 8;

10. *Decides* to remain seized of the matter.<sup>12</sup>

Throughout the fall of 1998, Libya reacted ambivalently to the proposal, on the one hand welcoming the "evolution" in the U.S. and UK position,<sup>13</sup> while on the other hand expressing concern about the trial's proposed location in the Netherlands, a former U.S. air base, which was agreed upon by the Dutch and British Governments on September 18. The Libyan Government announced that it would need to inspect the location before assenting to holding the trial there.<sup>14</sup> In a speech to the UN General Assembly on September 29, 1998, Libya's ambassador to the United Nations, Omar Dorda, criticized other aspects of the proposal, insisting that the accused should serve their sentences in either Libya or the Netherlands—and not in Scotland—if convicted.<sup>15</sup> Moreover, three top Libyan intelligence officials reportedly were tried, convicted, and jailed in Libya in connection with the Lockerbie incident, possibly as a means of blocking their testimony in the trial in the Netherlands.<sup>16</sup> Although in December 1998, the Libyan parliament reportedly approved the handing over of the two suspects for trial,<sup>17</sup> Libyan leader Col. Muammar el-Qaddafi informed the Dutch media on the tenth anniversary of the bombing that the solution lay in having an "international court" consisting of "judges from America, Libya, England and other countries."<sup>18</sup>

The next day, President Clinton reiterated that the U.S.-UK plan was a "take it or leave it offer" and that it was "necessary and right to pursue the perpetrators of this crime no matter how long it takes."<sup>19</sup>

#### NON-STATE ENTITIES IN INTERNATIONAL LAW

##### *Status of Palestine Liberation Organization at the United Nations*

The attitudes and practice with respect to UN membership questions of the United States, as the host state of the United Nations, are particularly important. On November 22, 1974, the Palestine Liberation Organization was granted observer status by the UN General Assembly.<sup>1</sup> In 1988, the General Assembly permitted the PLO to have its communications to the United Nations circulated as official documents of the United Nations, and changed the name of the delegation to "Palestine." The delegation enjoyed limited rights to participate in UN activities, and was able to maintain offices at the UN headquarters in New York.

On July 7, 1998, the General Assembly passed a resolution again upgrading the Palestinian delegation's status. The resolution reads in part:

*Aware* that Palestine is a full member of the League of Arab States, the Movement of Non-Aligned Countries, the Organization of the Islamic Conference, and the Group of 77 and China,

<sup>12</sup> SC Res. 1192 (Aug. 27, 1998).

<sup>13</sup> See, e.g., Letter Dated 26 August 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/808 (1998); see also UN Doc. S/PV.3920, at 4 (1998).

<sup>14</sup> See *Libya Wary of Site Choice for Bombing Trial*, WASH. POST, Sept. 21, 1998, at A16.

<sup>15</sup> See John M. Goshko, *Libya Adds Conditions for Pan Am Bombing Trial*, WASH. POST, Sept. 30, 1998, at A20.

<sup>16</sup> *Libya: 3 Jailed in Lockerbie Bombing*, N.Y. TIMES, Nov. 26, 1998, at A14.

<sup>17</sup> *Libyan Parliament Says Trial Deal Acceptable*, WASH. POST, Dec. 16, 1998, at A37.

<sup>18</sup> Barbara Crossette, *10 Years After Lockerbie, Still No Trial*, N.Y. TIMES, Dec. 22, 1998, at A14.

<sup>19</sup> Brooke Masters, *Clinton Vows to Keep Pressure on Libya*, WASH. POST, Dec. 22, 1998, at A3. On September 30, 1998, President Clinton authorized, pursuant to the Foreign Assistance Act of 1961, the use of approximately \$8 million to support the establishment and functioning of the court in the Netherlands. Memorandum on Funding for the Court to Try Accused Perpetrators of the Pan Am 103 Bombing, 34 WEEKLY COMP. PRES. DOC. 1939 (Sept. 30, 1998).

<sup>1</sup> GA Res. 3237, UN GAOR, 29th Sess., Supp. No. 31, at 4, UN Doc. A/9631 (1974).

*Aware also* that general democratic Palestinian elections were held on 20 January 1996 and that the Palestinian Authority was established on part of the occupied Palestinian territory,

*Desirous* of contributing to the achievement of the inalienable rights of the Palestinian people, thus attaining a just and comprehensive peace in the Middle East, [the General Assembly]

1. *Decides* to confer upon Palestine, in its capacity as observer, and as contained in the annex to the present resolution, additional rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspices of the Assembly or other organs of the United Nations, as well as in United Nations conferences;

2. *Requests* the Secretary-General to inform the General Assembly, within the current session, about the implementation of the modalities annexed to the present resolution.<sup>2</sup>

The annex elaborates:

The additional rights and privileges of participation of Palestine shall be effected through the following modalities, without prejudice to the existing rights and privileges:

1. The right to participate in the general debate of the General Assembly.
2. Without prejudice to the priority of Member States, Palestine shall have the right of inscription on the list of speakers under agenda items other than Palestinian and Middle East issues at a plenary meeting of the General Assembly, after the last Member State inscribed on the list of that meeting.
3. The right of reply.
4. The right to raise points of order related to the proceedings on Palestinian and Middle East issues, provided that the right to raise such a point of order shall not include the right to challenge the decision of the presiding officer.
5. The right to co-sponsor draft resolutions and decisions on Palestinian and Middle East issues. Such draft resolutions and decisions shall be put to a vote only upon request from a Member State.
6. The right to make interventions, with a precursory explanation or the recall of relevant General Assembly resolutions being made only once by the President of the General Assembly at the start of each session of the Assembly.
7. Seating for Palestine shall be arranged immediately after non-member States and before the other observers; and with the allocation of six seats in the General Assembly Hall.
8. Palestine shall not have the right to vote or to put forward candidates.

After the vote, the Permanent Observer of Palestine expressed gratitude to the states that had supported the resolution and the hope that Palestine would be accepted as a UN member state in the near future.<sup>3</sup>

Addressing the General Assembly before the vote, the Permanent Representative of the United States, William Richardson, stated in part:

We have no doubt that most members of this Assembly are sincere supporters of the peace process in the Middle East. They want to see that process moving forward

<sup>2</sup>GA Res. 52/250 (July 7, 1998). The resolution was adopted by a vote of 124 in favor (including France, Germany, Japan, and the United Kingdom) to 4 against (Micronesia, the Marshall Islands, the United States, and Israel), with 10 countries abstaining. UN Doc. A/52/PV.89, at 5 (1993). See also Craig Turner, *Palestinians War Upgraded Status at U.N.*, L.A. TIMES, July 8, 1998, at A1.

<sup>3</sup>UN Doc. A/52/PV.89, at 6-7 (1998).

again and are frustrated by the fact that there has been a prolonged impasse. So are we. . . . The fact remains, however, that by taking this action the General Assembly will have made it more difficult to accomplish this objective. Focusing on symbols likely to divide, rather than on steps to promote cooperation, will lead us nowhere. Supporting unilateral gestures which will raise suspicion and mistrust between negotiating partners will not take us closer to our goal.

. . . .

Moreover, if this draft resolution is adopted, it could also set a precedent. By overturning decades of practice and precedent in the General Assembly governing the participation of non-members and observers, others who do not enjoy full member status in the United Nations may well press their own claims for enhanced status. This would have serious repercussions for political relations among Member States and would have a deleterious effect on the orderly conduct of United Nations business.<sup>4</sup>

The U.S. Department of State spokesman, James P. Rubin, described the decision as a "unilateral act," despite being voted on by all countries in the General Assembly, because it was a resolution that was pushed by the PLO without Israeli participation. He also stressed the fact that the resolution "does not make them a state," and criticized "the precedent we think it unfortunately set for those in the observer category at the United Nations."<sup>5</sup>

After the resolution passed, the Palestinian delegation began circulating documents detailing plans to seek recognition by the United Nations of Palestine's right to statehood. Further, during the first participation by the PLO in the general debate of the General Assembly, PLO Chairman Yasir Arafat stated that the Palestinian people await "the establishment of their independent State, which must be established as an embodiment of the right to self-determination."<sup>6</sup>

#### STATE JURISDICTION AND JURISDICTIONAL IMMUNITIES

##### *Flatow Case: Suit Against Iran for Act of Terrorism*

On April 9, 1995, a suicide bomber drove a van loaded with explosives into a bus passing through the Gaza Strip, killing seven Israeli soldiers and one U.S. national—Alisa Michelle Flatow—a twenty-year-old college student spending a semester abroad in Israel.<sup>1</sup> The Shaqaqi faction of Palestine Islamic Jihad—a terrorist group funded by the Islamic Republic of Iran—claimed responsibility for the explosion.

An amendment to the Foreign Sovereign Immunities Act (FSIA)<sup>2</sup> enabled the deceased's father, Stephen M. Flatow, to sue Iran. The amendment allows suits for money damages against foreign states that cause personal injury or death "by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act," so long as the claimant or victim was a U.S.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> James P. Rubin, *U.S. Department of State Daily Press Briefing* at 4–6 (July 7, 1998), available in <http://secretary.state.gov/www/briefings/9807/980707db.html>.

<sup>6</sup> Yasser Arafat *Urges Pressure on Israel to Carry Out Existing Agreements As He Makes First Address in Assembly's General Debate*, UN Press Release GA/9456 (Sept. 28, 1998), available in <http://www.un.org/news/press/docs/1998/19980928.ga9456.html>. See also Arafat, at U.N., *Urges Backing for Statehood*, N.Y. TIMES, Sept. 29, 1998, at A10.

<sup>1</sup> See Bill Miller & John Mintz, *Once-Supportive U.S. Fights Family Over Iranian Assets*, WASH. POST, Sept. 27, 1998, at A8.

<sup>2</sup> 28 U.S.C. §§1330, 1602–1611 (1994). The amendment, made pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §221, 110 Stat. 1214, 1241 (1996), added 28 U.S.C. §1605(a)(7) and §1610(a)(7).

national at the time the act occurred, the state is designated by the Secretary of State as a sponsor of terrorism, and the act occurred outside the state's territory. Significantly, unlike the six other exceptions to immunity contained in the FSIA, this amendment permits the claimant to execute a judgment against state-owned property regardless of whether the property was involved in the act upon which the claim is based.

On March 11, 1998, the U.S. District Court for the District of Columbia found that Iran was not immune from suit and was responsible for the death of Michelle Flatow. The district court held the Islamic Republic of Iran, the Iranian Ministry of Information and Security, Ayatollah Khamenei, former President Hashemi-Rafsanjani and former Minister Fallahian-Khuzestani, jointly and severally, liable for compensatory and punitive damages in an amount of \$247 million.<sup>3</sup>

To satisfy the judgment, Mr. Flatow moved on July 6, 1998, to attach three properties owned by Iran in Washington, D.C.: the former Iranian Embassy, and the residences of the Minister of Cultural Affairs and the Military Attaché of the Embassy of Iran. The district court initially granted the motion and ordered writs of attachment on July 7, 1998, but stayed them on July 9, 1998, requesting that the U.S. Government file a statement outlining why they should be quashed. The U.S. Government filed a statement with the court on July 23, 1998, which read in part:

There are a number of independent and compelling reasons why the identified properties cannot be attached

A. The Foreign Missions Act [(FMA)] Explicitly Prohibits Attachment of the Identified Properties

The FMA confers upon the Secretary of State broad powers to regulate the privileges and immunities enjoyed by foreign missions and mission personnel within the United States. Actions taken by the State Department pursuant to the FMA are grounded in national security and foreign policy considerations and are based upon considerations of reciprocity among nations. See 22 U.S.C. §4301(b). "When exercising its supervisory function over foreign missions, the State Department acts at the apex of its power." *Palestine Information Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir. 1988). The broad authority granted by the FMA has been delegated by the Secretary to the Director of the Office of Foreign Missions ("OFM"), who holds the rank of ambassador. See 22 U.S.C. §4303.

22 U.S.C. §4305(c) authorizes OFM to "protect and preserve any property of [a] foreign mission" if that mission has ceased conducting diplomatic, consular and other governmental activities and has not designated a protecting power (or other agent) approved by the Secretary to be responsible for the property of that foreign mission. The term "foreign mission" is defined by the FMA to include any mission in the United States which is involved in the diplomatic or consular activities of a foreign government, including any real property of such mission and including the personnel of such a mission. See 22 U.S.C. §4302 (a) (3) (A). Section 4308(f) of the FMA specifically prohibits the attachment of or execution upon mission property that is being held by the Department of State. That provision states that "[a]ssets of or under the control of the Department of State, wherever situated, which are used by or held for the use of a foreign mission *shall not be subject to attachment, execution, injunction, or similar process, whether intermediate or final.*" 22 U.S.C. §4308(f) (emphasis added).

In *United States v. Central Corp. of Illinois*, No. 87c5072, 1987 WL 20129 (N.D. Ill. Nov. 13, 1987) . . . , for example, the Court relied upon this provision of the FMA to nullify the sale of two condominiums, which had formerly been used as residences by consular officers in the Iranian consulate in Chicago. The purchaser of the

<sup>3</sup> Flatow v. Islamic Republic of Iran, 999 F.Supp. 1 (D.D.C. 1998).

condominiums argued, *inter alia*, that the FMA was inapplicable because, as residences, the condominiums were not property of a foreign mission. The Court, however, rejected this argument, noting that the Secretary had determined that the condominiums were part of the mission, and that the Secretary's determination, while reviewable, was entitled to "great deference." *Id.* at 2. The Court found no reason why the condominiums should not be considered part of the mission or, at least, "an asset" of the foreign mission. *See id.*

Similarly, the properties identified in the Court's Order To Issue Writs Of Attachment are diplomatic properties of the Government of Iran. Under the Article 1(i) of the [Vienna Convention on Diplomatic Relations] VCDR, the residence of the Ambassador is considered part of the Embassy itself. Article 30 of the VCDR provides that diplomatic residences enjoy the same inviolability and protection as the Embassy. . . . As the residences of the Iranian Ambassador and other diplomatic personnel, each of the three properties owned by the Government of Iran constitutes property of a foreign mission as that term is defined in the FMA. *See* 22 U.S.C. §4302(a) (3) (A). *See also Central Corp. of Illinois*, 1987 WL 20129, at 2. Furthermore, the Secretary has undertaken the responsibility to protect and preserve the property of the Iranian mission to the United States, because the mission has ceased conducting diplomatic activities in the United States and the State Department has not approved the Iranian Protecting Power, now the Government of Pakistan, to assume custody of the properties. Because the identified properties are properties of a foreign mission, and because they are in the custody of OFM, under the plain language of Section 4308(f), they are not subject to attachment, execution or any other similar process.

#### B. The Identified Properties Are Not Subject to Attachment Under The Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act ("FSIA") provides another source of immunity from the attachment or execution of diplomatic property of a foreign state. By its very terms, 28 U.S.C. §1609, which is titled "[i]mmunity from attachment and execution of property of a foreign state," provides a general immunity from attachment and execution for all property of a foreign state except as provided by 28 U.S.C. §§1610 and 1611. 28 U.S.C. §1610, is titled "[e]xceptions to the immunity from attachment or execution." Subsection (a) of that section defines the scope of the exception with respect to property in the United States of a foreign state, and provides in relevant part that:

The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, *used for a commercial activity in the United States*, shall not be immune from attachment in aid of execution, or from execution upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . .

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a) (7), regardless of whether the property is or was involved with the act upon which the claim is based

(emphasis added). Thus, the exception to a foreign state's immunity from attachment or execution under 28 U.S.C. §1609, is limited to "property in the United States of a foreign state . . . *used for commercial activity in the United States*." 28 U.S.C. §1610 (emphasis added). The identified properties were used by the Government of Iran as residences of the ambassador and other diplomatic personnel and do not, therefore, qualify as property "used for a commercial activity in the United States" as a matter of law. *See Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 36-37 (3d Cir. 1985) (although purchase of property was commercial transaction, its use as a diplomatic residence "as a matter of law . . . is not commercial activity"); *S & S Machinery Co. v. Masinexportimport*, 802 F.Supp. 1109, 1111-12 (S.D.N.Y. 1992) (mission buildings are not used for commercial activity and do not fall within exception to immunity); *United States v. Arlington County*, 702 F.2d 485, 488 (4th Cir. 1983); *United States v. County of Arlington*, 669 F.2d 925, 934-35 (4th Cir.) ("[w]e

therefore conclude that [FSIA] §1609 affords the GDR immunity for its apartment from execution of the tax lien and that none of the exceptions found in §1610 are applicable"), *appeal dismissed*, 459 U.S. 801 (1982). Indeed, the legislative history of the FSIA confirms that "embassies and related buildings could not be deemed to be property used for a 'commercial' activity as required by section 1610(a)." H. Rep. No. 94-1487, at 29, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6628.

The fact that these properties are not now used by Iran as diplomatic residences does not render them commercial. Likewise, the fact that the State Department has chosen to discharge its treaty obligation to protect the properties by renting two of them out and using the rental proceeds for maintenance, rather than using taxpayer dollars to maintain them, does not alter their non-commercial character. This is consistent with the OFM's prior management of the diplomatic properties of other countries with which the United States had no diplomatic relations, and custody of such property had not been turned over to a protecting power. . . .

C. Attachment Would Interfere with the Ability of the United States to Discharge its International Obligations Under the Vienna Convention

Attachment of the identified properties would also interfere with the ability of the United States to carry out its obligations under the Vienna Convention on Diplomatic Relations. The VCDR grants a wide range of privileges and immunities to diplomatic property and residences of diplomats, including the inviolability of diplomatic premises, a duty on the part of the host state to accord "full facilities" for the performance of mission functions. *See* VCDR, Articles 22, 25, and 30. Of particular relevance to the issue now before this Court is VCDR Article 45(a), which provides that "[i]f diplomatic relations are broken off between two States . . . (a) the receiving State must, even in the case of armed conflict, respect and protect the premises of the mission, together with its property and archives."

Thus, the United States has a legal obligation under the VCDR to protect Embassies and their diplomatic property in the United States in the event that diplomatic relations between the United States and a foreign country are severed, even if the parties are at war. As noted above, the Ambassador's residence is part of the premises of the Embassy itself and the diplomatic residences owned by Iran are property of the Embassy. If possession and custody of these properties were taken from the Department of State and transferred to satisfy a judgment, the United States would not be able to fulfill its international obligation to protect the properties.

D. Attachment of and Execution Against the Properties At Issue Would Adversely Affect the Foreign Policy Interests of the United States

As the foregoing discussion demonstrates, enforcement of judgments through attachment of or execution against the identified properties implicates important foreign policy interests of the United States. These foreign policy interests include the United States' reciprocal treaty obligations, the ability of the State Department to represent the interests of the United States in foreign affairs, and the ability of the State Department to exercise its authority over foreign missions. It is, of course, well-established that the courts must give "great" deference to the State Department on questions of foreign policy. *Palestine Information Office*, 853 F.2d at 942; *see also Regan v. Wald*, 468 U.S. 222, 242 (1984).

The United States has clear international legal obligations regarding diplomatic and consular property. These obligations are critically important. In order effectively to hold other countries to their obligations under the VCDR, the United States must adhere to its own obligations. Allowing the attachment of the diplomatic property at issue in this case could set a precedent, jeopardizing the ability of the United States to protect its missions abroad from similar acts by foreign governments.

Moreover, these properties are blocked under Executive Order 12170. . . . Allowing attachment of blocked properties would contravene the Executive Order and



rob the President of a critical "bargaining chip" to be used . . . when dealing with a hostile country." *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981). . . . The United States has held Iranian diplomatic properties as a reciprocal action in response to Iran's breach of its obligations under the VCDR to permit Switzerland, the United States protecting power, to assume custody of U.S. diplomatic properties in Iran. Continued unencumbered custody of Iran's diplomatic and consular properties is essential to preserving the United States' position on the current status of the diplomatic and consular properties of the two government[s]. If allowed to stand, this Court's July 7, 1998 Order would undermine the President's powers in ways that would harm the interests of the United States, not only with respect to Iran, but also with respect to other foreign states against which U.S. economic sanctions have been imposed.

#### CONCLUSION

To reemphasize, the United States is not filing this Statement of Interest on behalf of the Government of Iran. As the above discussion details, the United States has statutory and international legal obligations concerning the identified property which we believe the Court is bound to respect.

. . . .

In the final analysis, international legal obligations are observed on the basis of reciprocity. If the United States does not uphold its international legal obligations, other countries in turn may not uphold their international legal obligations which benefit the United States. Attachment of the identified properties could expose the United States diplomatic missions and their property and personnel abroad to acts of retaliation. Therefore, it is in the United States' vital interest to protect diplomatic properties like the identified properties from attachment and execution.

For the foregoing reasons, this Court should vacate its July 7, 1998 Order To Issue Writs Of Attachment On Judgment and quash the writs issued with respect thereto.<sup>4</sup>

Thereafter, Congress again amended the Foreign Sovereign Immunities Act to allow U.S. victims of terrorism to attach and execute judgments against a foreign state's diplomatic and consular properties.<sup>5</sup> The amendment (contained in section 117 of the relevant law) included a provision allowing suspension by the President, which was exercised on October 21, 1998. President Clinton explained the reasons for exercising the waiver as follows:

If this section [of the Act] were to result in attachment and execution against foreign embassy properties, it would encroach on my authority under the Constitution to "receive Ambassadors and other public Ministers." Moreover, if applied to foreign diplomatic or consular property, section 117 would place the United States in breach of its international treaty obligations. It would put at risk the protection we enjoy at every embassy and consulate throughout the world by eroding the principle that diplomatic property must be protected regardless of bilateral relations. Absent my authority to waive section 117's attachment provision, it would also effectively eliminate use of blocked assets of terrorist states in the national security interests of the United States, including denying an important source of leverage. In addition, section 117 could seriously affect our ability to enter into global claims settlements that are fair to all U.S. claimants and could result in U.S. taxpayer liability in the event of a contrary claims tribunal judgment. To the extent possible, I shall construe section 117 in a manner consistent with my constitutional authority

<sup>4</sup> Statement of Interest of the United States at 6-17, *Flatow v. Iran*, 999 F.Supp. 1 (D.D.C. 1998) (Civil No. 97-396), reprinted in MEALEY'S INT'L ARB. REP., Aug. 1998, at B2, B2-B7 (footnote omitted).

<sup>5</sup> The amendment is contained in §117 of the Treasury and General Government Appropriations Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

and with U.S. international legal obligations, and for the above reasons, I have exercised the waiver authority in the national security interest of the United States.<sup>6</sup>

#### INTERNATIONAL CRIMINAL LAW

##### *U.S. Decision Not to Sign Treaty Establishing International Criminal Court*

On July 17, 1998, a UN diplomatic conference in Rome attended by 160 states adopted and opened for signature a treaty to establish a permanent international criminal court (ICC) by a vote of 120 in favor, 7 opposed, and 21 abstentions. The ICC will adjudicate cases of war crimes, genocide, crimes against humanity and the crime of aggression, and—unlike international tribunals on the former Yugoslavia and Rwanda—will cover all areas of the world and will sit permanently in The Hague. The treaty, formally known as the “Rome Statute of the International Criminal Court,” will enter into force sixty days after ratification by the sixtieth country, and will not address crimes committed before that date.<sup>1</sup>

The U.S. Ambassador-at-Large for War Crimes Issues and head of the U.S. delegation to the UN conference, David J. Scheffer, explained the United States’ refusal to sign the treaty in a statement delivered to the Senate Foreign Relations Committee on July 23, 1998.<sup>2</sup> A more detailed explanation by Ambassador Scheffer of the U.S. concerns at the Rome Conference appears elsewhere in this issue.<sup>3</sup>

On September 1, 1998, UN Secretary-General Kofi Annan rejected the U.S. position, and, while lauding South Africa for being one of the first countries to sign the statute, expressed hope that “the United States, and many other states, will follow South Africa’s example soon.”<sup>4</sup>

Even had the Clinton administration been able to satisfy the concerns expressed by Ambassador Scheffer, its ability to obtain the U.S. Senate’s consent to ratification was far from certain. Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, had announced that a proposal for an international court that could prosecute American soldiers for war crimes would be “dead on arrival” at his committee, regardless of the executive branch’s position on the issue.<sup>5</sup> Further, after completion of the Rome Conference, Congress enacted legislation providing as follows:

(a) PROHIBITION.—The United States shall not become a party to any new international criminal tribunal, nor give legal effect to the jurisdiction of such tribunal over any matter described in subsection (b), except pursuant to—

(1) a treaty made under Article II, section 2, clause 2 of the Constitution of the United States on or after the date of enactment of this Act; or

(2) any statute enacted by Congress on or after the date of enactment of this Act.

(b) JURISDICTION DESCRIBED.—The jurisdiction described in this section is jurisdiction over—

<sup>6</sup> Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 37 WEEKLY COMP. PRES. DOC. 2108, 2113 (Oct. 23, 1998).

<sup>1</sup> For the text of the treaty, see UN Doc. A/CONF.183/9\* (July 17, 1998), reprinted in 37 ILM 999 (1998), and available in (<http://www.un.org/icc>).

<sup>2</sup> David J. Scheffer, *Developments at the Rome Treaty Conference*, U.S. DEPT. STATE DISPATCH, Aug. 1998, at 19, 20–22.

<sup>3</sup> See *The United States and the International Criminal Court*, *supra* p. 12.

<sup>4</sup> *Annan Urges Countries to Sign International Court Statute*, AGENCE FRANCE-PRESSE, Sept. 1, 1998, available in 1998 WL 16590114.

<sup>5</sup> Letter from Sen. Jesse Helms to Secretary of State Madeleine K. Albright (Mar. 26, 1998) (on file with the U.S. Department of State, S/WCI).

(1) persons found, property located, or acts or omissions committed, within the territory of the United States; or

(2) nationals of the United States, wherever found.

(c) STATUTORY CONSTRUCTION.—Nothing in this section precludes sharing information, expertise, or other forms of assistance with such tribunal.<sup>6</sup>

#### INTERNATIONAL ECONOMIC LAW

##### *Restructuring Proposals to Address 1997–1998 Global Economic Turmoil*

A wave of financial crises that began in Thailand in mid-1997 spread steadily across large parts of the globe, leaving in its wake plunging markets, currency devaluations, declines in commodity prices, bank failures, and bankruptcies. Japan and several Asian emerging market economies plunged into recession, and the Russian economy collapsed, leading to a general retreat by investors from emerging markets. In response, some countries, such as Malaysia, imposed exchange and capital controls to restrict the rights of investors to move money freely across borders. By October 1998, the stock market of the world's second largest economy, Japan, had fallen to its lowest level in twelve years.

Despite multibillion-dollar rescue packages by the International Monetary Fund in various countries, global financial difficulties continued, prompting many to rethink the role of the IMF. To critics, the IMF (with the strong backing of the United States) encouraged developing countries throughout the 1990s to open their markets not only to goods from abroad, but also to capital. Those countries complied, resulting in massive private loans and investments in emerging markets, which had the beneficial effect of raising living standards in those countries. In several countries, however, funds poured into poorly run banking systems and many loans went to government-selected industrial projects or politically connected real estate ventures. When the economies of the countries stalled, panicked investors lost confidence and pulled their investments out, aggravating the situation.

In an effort to stem the tide, on October 2, 1998, President Clinton proposed that the World Bank, the Inter-American Development Bank, and the Inter-American Bank provide countries suffering from withdrawals of capital with new loan guarantees and other emergency credits. Further, President Clinton proposed that the IMF provide lines of credit to countries that appear vulnerable to financial difficulties, but have not yet fallen into full-fledged crises.<sup>1</sup> (The IMF normally waits until a country is in financial crisis before providing financial assistance.) The U.S. proposals met with some support from other leading industrial countries.<sup>2</sup>

U.S. Treasury Secretary Robert E. Rubin, in a speech delivered to the IMF Interim Committee on October 4, 1998, addressed these two initiatives for short-term relief, as well as other initiatives the United States regarded as necessary to promote a sound global economy in the longer term:

<sup>6</sup> Section 2502 of the Foreign Affairs Reform and Restructuring Act of 1998, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

<sup>1</sup> See David E. Sanger, *Clinton Proposes I.M.F. Act Earlier to Prevent Crises*, N.Y. TIMES, Oct. 3, 1998, at A1; Paul Blustein, *U.S. Offers Plan to Aid Global Economy*, WASH. POST, Oct. 3, 1998, at A1.

<sup>2</sup> See David E. Sanger, *Finance Ministers Agree to Explore Clinton I.M.F. Plan*, N.Y. TIMES, Oct. 4, 1998, at 1; Paul Blustein, *U.S. Aid Proposals Get G-7 Backing*, WASH. POST, Oct. 4, 1998, at A1.

The financial crisis which erupted a little over a year ago and continues today represents a substantial challenge to the global trade and financial system that has been built over the past 50 years. It is clear that the balance of risks has changed, creating new challenges for us.

....

The international financial institutions have been and will continue to be at the center of our efforts to deal with the crisis, providing conditional assistance that is crucial for a nation to have the breathing room to focus on reform. To buttress the efforts of the international financial institutions, we must not only provide them with the financial backing they need to do their job, but also work with them to develop innovative ways to deal with events that are, in a number of ways, unprecedented.

With this in mind, the United States has put forward for consideration two initiatives. The first is a strengthened IMF financing mechanism to increase our ability to respond to difficult global financial conditions which are adversely affecting even those emerging market and developing countries which are pursuing sound policies. Such a strengthened capacity could take the form of a contingency line of credit for countries that are pursuing strong reform programs but, nevertheless, face the threat of destabilization, given the turbulence in today's global markets. The second proposal is for the World Bank and other MDBs [multilateral development banks] to develop a new emergency capacity with particular focus on support for the most vulnerable groups in society and financial sector restructuring. This would involve using loan guarantees and other innovative means to leverage private sector involvement as a means of helping emerging market and developing countries attain better access to international capital markets, and to expand their own lending as much as possible for sound operations within their guidelines to countries now affected by the crisis.

#### *Building a stronger architecture*

The longer-term challenge is to reform the global financial architecture to better prevent financial instability, and to allow the system to manage such instability when it occurs with a minimum of damage and pain to all those affected. Beginning in 1994 at the Naples Leaders' Meeting, the international community embarked on this long-term effort. These are enormously complex issues, requiring great rigor and seriousness. While a great deal remains to be done, considerable progress has been made in diagnosing the problems, and a broad consensus is emerging on the basic elements of appropriate remedies. In the view of the United States, there is a need for action now in four, mutually reinforcing areas: (1) increased transparency and openness in the international financial system; (2) strengthened national financial systems, particularly in emerging market economies; (3) promotion in industrial nations of more soundly based capital flows; and (4) developing new ways to respond to crises, including greater participation by the private sector.

*Transparency:* More transparency, on what is happening in our economies and how policies are formulated, is essential for markets to function efficiently and price risks accurately, to encourage sound governmental policies that are supported by the public and to foster accountability by public and private institutions. The IMF has played a leading role in developing standards on the dissemination of data. The SDDS [Special Data Dissemination Standard], to which 46 countries have now subscribed, represents a significant advance in promoting the publication of comprehensive, timely, high quality information. In cooperation with other international organizations, the Fund should complete the current review of the SDDS by the end of the year and broaden the coverage of required reserve data to include information on the range of reserve-related liabilities which may impair the availability of a country's reserves. The Fund should also expedite consideration of measures to monitor short-term capital flows and to include data on short-term external indebtedness in the SDDS.

The introduction of standards and codes of best practices on monetary and financial policies and fiscal transparency, which the Fund has developed or is developing, can help to promote good governance and accountability in the public sector. However, this effort needs to be complemented by mechanisms for monitoring implementation and compliance to prevent abuse and to promote improved transparency. The Fund should accord a high priority to putting such a monitoring mechanism in place at an early date and to publishing its results.

. . . .

*Strengthened Financial Systems:* The technologies which have permitted the emergence of a global financial market with a vast array of sophisticated new instruments have enabled investors to diversify risk and provided borrowers more ways to tap foreign savings to increase domestic investment and growth. But the resulting enormous expansion of cross-border capital flows has also proven to be extremely sensitive to changes in market sentiment. While the world has experienced financial crises in the past, including Europe in 1992 and Mexico in 1995, the current crisis is unprecedented in size, speed, and geographic scope.

A first priority in dealing with today's more volatile global financial markets is to have in place strong domestic financial systems and a legal and regulatory infrastructure that will enable the economy to realize the opportunities afforded by open capital markets while reducing the risks. This requires the further development and implementation of "best practices" for supervising financial institutions and developing a strong credit culture and risk management procedures. Countries also need to put in place comprehensive programs to repair and test institutions' computer codes to ensure that such systems can handle year 2000 dates.

A robust financial system and solid supervisory structure will take time to put in place. The international community can help by providing technical and financial assistance. More powerful incentives to encourage reform efforts will also be important. We support a stronger surveillance mechanism, anchored in the IMF, which would work with the World Bank, and the international standard-setting bodies could monitor financial systems as a means of encouraging adoption of best practices and dealing with potential problems.

Care will also be required in establishing the pace, timing and sequence of measures to integrate economies into the global capital market. In particular, a country should seek to have in place the institutional structures and prudential capacity commensurate with its degree of integration to enable the system to respond effectively to the potential volatility associated with short-term capital flows, particularly interbank transaction. While the current crisis underscores the need for care in the process of integration, this should not be seen as a reason to reject integration, but rather as a motivation to accelerate steps to strengthen financial institutions and, particularly, prudential regulations and supervision.

*Promoting more soundly based capital flows:* Events of the last year highlight the importance of measures to more effectively encourage providers of portfolio capital and banks to analyze and weigh risks and rewards in a more disciplined fashion in both good times and bad. Market discipline—which is central to a market-based economy through the encouragement of sound policy and the efficient allocation of capital—only works if market participants act with discipline. Toward this end, we in the industrialized countries must provide better regulation and supervision—including more effective focus on risk management systems in financial institutions—and strong prudential standards that pay attention to the riskiness of different types of investment, through a broad range of financial institutions, not merely banks. In addition, improved transparency in the financial sectors of emerging markets can provide investors with information they need to weigh risks, and thereby facilitate market discipline.

*Resolving crises:* There is general recognition in the international community that we need to develop better ways to resolve financial crises. Looking forward, the IMF

must continue to play the central role in resolving crises by supporting members' adjustment efforts, including through the provision of exceptional financing on a large scale in situations involving systemic risk. The international community also can play a part in facilitating an orderly resolution of crises through continued IMF support for the process. For this purpose, we welcome the IMF's intention to expand its lending into arrears policy as a means of providing continued financial support to a country's adjustment efforts as it seeks in good faith to negotiate an orderly resolution with its creditors.

However, in today's world it is neither practical nor desirable for the IMF and other official lenders to undertake the full financing responsibility. The private sector therefore must also do its share in forestalling and resolving crises. The manner in which private sector participation is achieved can have important consequences, both for the country involved and the system more generally. It is overwhelmingly important that such cooperation be obtained at an early stage and based on voluntary market-based approaches rather than unilateral restructurings or debt moratoria that could preclude future market access and increase the risk of contagion. Such an orderly resolution could be enhanced by encouraging a dialogue between debtors and creditors to exchange information before a crisis occurs and to facilitate negotiations after its onset. However, care would need to be taken to avoid the problem of insider information by undertaking a dialogue in "full sunshine." We also support suggestions to modify the terms of bond contracts and loan agreements to facilitate collective action by creditors in a world characterized by much more complex relationships than in earlier, simpler times.<sup>3</sup>

The next day, Secretary Rubin, in a speech to a joint meeting of representatives of the IMF and the World Bank, set forth the following "immediate actions" in which the United States believed both institutions must be engaged:

- convincing countries in crisis to stay engaged in the global economy; misguided exchange and capital controls are not the answer for dealing with the effects of this crisis. While the loss of confidence and resulting flight of capital from many emerging market economies has carried with it a heavy cost, measures that would effectively prevent the return of this capital will only postpone recovery and the restoration of economic growth. Indeed, countries that use these measures to allow for the adoption of unsound policies or to insulate companies and banks from competition will in the end pay a heavy price in lost economic growth.
- accelerating the pace of comprehensive corporate and financial restructuring in countries where there is a systemic problem notably in Asia where the severe indebtedness of both the financial and corporate system is a serious barrier to recovery and where addressing the overhang of domestic debt is essential. Progress has been made and frameworks for dealing with these issues have gradually been put in place, however we remain concerned that necessary restructuring is proceeding too slowly to restore economic growth quickly given the systemic nature of the problem and the sheer magnitude of corporate and bank insolvency.
- providing increased social safety nets in the countries in crisis to help the least advantaged citizens in those countries who are experiencing hardship. The World Bank and ADB [Asian Development Bank] are well positioned to provide adequate government spending in the areas of health and education—two of the most crucial areas in which the MDBs should focus their resources. In addition, employment generation plans, support to SMEs [small-to-medium enterprises], and support in the development of unemployment insurance and pension plans, is needed.

<sup>3</sup> U.S. Treasury Secretary Robert E. Rubin, Statement to the IMF Interim Committee of the Board of Governors of the International Monetary Fund, *Treas. Dept. Press Release No. RR-2737* (Oct. 4, 1998).

- continuing discussion on new instruments for emergency assistance while adhering to prudential norms of the Bank's financial structure. Led by the World Bank, the multilateral development banks have played a vital role in providing exceptional assistance to support priority reforms in countries in crisis. Looking ahead, it is essential for the institutions to have the capacity to engage substantially and quickly as circumstances require. Current discussions have been helpful in identifying ways to strengthen the Bank's risk-bearing capacity, and creative thinking such as the Bank's proposals for an Emergency Structural Adjustment Loan (ESAL) [is] appreciated. Additional steps such as aggressive use of the Bank's guarantee instrument; measures to strengthen net income and reserves, including increased charges and elimination of commitment and interest waivers; and, making use of additional leverage that may be available in the balance sheet should also be considered.

- reinforcing good governance and transparency in both public and private sectors—including, but not limited to the financial sector. Key elements of good governance and transparency should include, at a minimum, international generally accepted accounting principles, budget transparency, independent audit function, anti-corruption mechanisms and public participation. The IFIs [international financial institutions] are well positioned to lead on these crucial issues, and we look to them to exercise that leadership forcefully.<sup>4</sup>

The IMF and World Bank annual meetings adopted President Clinton's proposals for emergency credits for countries suffering from withdrawals of capital and for a new standby loan fund linked to the IMF that would bolster the financial defenses of countries before investors begin removing funds. Moreover, the annual meetings endorsed new approaches for regulating international capital flows and a new IMF policy that would allow countries facing extreme financial crises to halt temporarily all debt payments to foreigners.<sup>5</sup> No breakthrough emerged from the meetings, however, for dramatically curtailing the continued global financial turmoil.<sup>6</sup>

On October 22, 1998, President Clinton signed legislation providing \$17.9 billion in additional U.S. funds for IMF financing.<sup>7</sup> Before the funds could be obligated, however, the law required the Secretary of the Treasury and the Chairman of the Board of Governors of the Federal Reserve Bank to inform the Congress that the major shareholders of the IMF have publicly agreed to "act to implement" certain policies. Those policies included pursuing certain reforms in borrowing countries, such as reducing restrictions on trade in goods and services; pressing for greater public disclosure by the IMF of its programs and agreements with countries and of internal IMF discussions; and pressing for an increase in the interest rate charged by the IMF on its loans. The law also provided for the creation of a congressional advisory committee to review global financial structures; the creation of a U.S. Treasury Department advisory committee on the IMF; and detailed reporting to the Congress by the Treasury Department on IMF operations.

<sup>4</sup> U.S. Treasury Secretary Robert E. Rubin, Statement at the 58th Development Committee of the World Bank and International Monetary Fund, Treas. Dept. Press Release No. RR-2738 (Oct. 5, 1998).

<sup>5</sup> Paul Lewis, *U.S. Said to Face Brunt of Economic Crisis*, N.Y. TIMES, Oct. 9, 1998, at A8; Paul Blustein, *IMF Plan Eases Burden for Stricken Nations*, WASH. POST, Oct. 8, 1998, at A13; Paul Blustein, *22 Nations Plan Rules on Flow of Capital*, WASH. POST, Oct. 6, 1998, at 1.

<sup>6</sup> David E. Sanger, *Meeting of World Finance Leaders Ends, With No Grand Strategy but Many Ideas*, N.Y. TIMES, Oct. 8, 1998, at A6; Paul Blustein, *IMF Chief Upbeat Even as Turmoil Continues*, WASH. POST, Oct. 9, 1998, at A1.

<sup>7</sup> Title VI of the Foreign Operations, Export Financing, and Related Programs Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

### *President Denied "Fast-Track" Trade Negotiating Authority*

As is well-known, the U.S. Constitution grants Congress the exclusive authority to establish tariffs and enact other legislation governing international trade.<sup>1</sup> At the same time, the Constitution grants to the President the authority to negotiate international agreements.<sup>2</sup> If the President negotiates an agreement that requires changes in U.S. tariffs, implementing legislation must be approved by Congress. Beginning in the 1970s, Congress enacted "fast-track" legislation that provided an expedited procedure for congressional consideration of trade agreements. Under fast-track legislation, the President engages in extensive consultations and coordination with Congress during the course of the negotiating process and, in exchange, Congress votes on the required implementing legislation within a fixed time after the negotiation is completed, with a simple "up or down vote" (i.e., without any amendments). The purpose of the fast-track process was to provide the President with credibility when negotiating difficult trade agreements by drawing Congress into the process and by making it unlikely that the agreement, once concluded, would fall victim to legislative haggling.

On April 16, 1994, the existing fast-track legislation expired.<sup>3</sup> In 1997, the President proposed to Congress the Export Expansion and Reciprocal Trade Agreements Act, designed to renew fast-track procedures (and to renew the President's authority to proclaim tariff reductions in return for tariff reduction commitments by U.S. trading partners). Such legislation was passed by the Senate in 1997, but was held over in the House until 1998. On September 25, 1998, the House defeated the bill<sup>4</sup> by a recorded vote of 180 in favor and 243 opposed. Although most Republicans favored the bill (151 in favor, 29 against), most Democrats did not (71 in favor, 171 against). Much of the Democratic opposition reflected fears by organized labor that, under further free trade agreements, existing U.S. jobs would be lost both from an influx of inexpensive foreign-made goods and from the movement of manufacturing facilities from the United States to low-wage countries.<sup>5</sup>

### ARMS CONTROL AND OTHER NATIONAL SECURITY LAW

#### *U.S.-Russia Agreement to Exchange Information on Missile Launches*

During President Clinton's trip to Russia in September 1998, he and President Yeltsin signed a joint statement that provides for the sharing of information on the launches of ballistic missiles and space rockets. At past summits, in 1995 and 1997, the two Presidents had already addressed sharing of such information related to theater missile defenses; this most recent agreement extended their cooperation into the strategic arena.

The joint statement issued by President Clinton and Russian President Yeltsin reads:

Taking into account the continuing worldwide proliferation of ballistic missiles and of missile technologies, the need to minimize even further the consequences of a false missile attack warning and above all, to prevent the possibility of a missile launch caused by such false warning, the President of the United States and the President of the Russian Federation have reached agreement on a cooperative

<sup>1</sup> U.S. CONST. Art. I, §8.

<sup>2</sup> *Id.*, Art. II, §2.

<sup>3</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988); Uruguay Round of Multilateral Trade Negotiations Act, Pub. L. No. 103-49, 107 Stat. 239 (1993) (the authority granted by the 1988 Act was extended in 1993 for an additional six months in order to complete the Uruguay Round of multilateral trade negotiations).

<sup>4</sup> H.R. 2621, 105th Cong. (1997).

<sup>5</sup> See Juliet Eilperin, *House Defeats Fast-Track Trade Authority*, WASH. POST, Sept. 26, 1998, at A10.



initiative between the United States and Russia regarding the exchange of information on missile launches and early warning.

The objective of the initiative is the continuous exchange of information on the launches of ballistic missiles and space launch vehicles derived from each side's missile launch warning system, including the possible establishment of a center for the exchange of missile launch data operated by the United States and Russia and separate from their respective national centers. As part of this initiative, the United States and Russia will also examine the possibility of establishing a multilateral ballistic missile and space launch vehicle pre-launch notification regime in which other states could voluntarily participate.

The Presidents have directed their experts to develop as quickly as possible for approval in their respective countries a plan for advancing this initiative toward implementation as soon as practicable.

Russia, proceeding from its international obligations relating to information derived from missile attack warning systems, will reach agreement regarding necessary issues relating to the implementation of this initiative.<sup>1</sup>

Reminding journalists at a news conference held in Moscow on September 1, 1998, of a 1995 incident involving a Norwegian scientific rocket launch that temporarily registered on Russia's early-warning detection system as an attack, Robert Bell, Special Assistant to the President for National Security Affairs, stated that the new agreement would strengthen "strategic stability by establishing further protection against the possibility of a nuclear launch by one side triggered by the misinterpretation of data concerning the origin, aim point or missile type associated with a particular launch."<sup>2</sup>

Bell outlined five key elements that were agreed upon by the two Presidents before noting issues that have yet to be addressed:

First, the data sharing will be reciprocal and continuous. We will provide information to [the Russians], they will provide information to us on a continuous and virtual real time basis. Second, the data will include information on strategic ballistic missiles, theater and intermediate-range ballistic missiles, and space-launched vehicles launched worldwide. Third, the data will include information derived from each country's launch detection satellites and their ground-based radars. Fourth, each side will process its own early warning data at their own national centers before providing it . . . to the other state. And, fifth, the multilateral pre-launch notification regime for ballistic missile and space launch vehicle launches will be open on a voluntary basis as to all countries that choose to participate.

. . . .

Now, remaining to be decided are questions relating to the exact scope and specificity of the data being provided and the architecture for relaying and receiving it. For example, the United States and Russia will need to consider whether, in addition to the national centers each nation will establish to provide the other with the early warning data, whether we should include a separate or third center that would be operated and manned by both nations. At such a center the United States and Russia could have military officers sitting side by side to answer questions about each other's data, or to initiate communications back to their own respective command and control systems to try to resolve any ambiguities. And the joint

<sup>1</sup> Joint Statement on the Exchange of Information on Missile Launches and Early Warning, Sept. 2, 1998, 34 WEEKLY COMP. PRES. DOC. 1694 (Sept. 2, 1998).

<sup>2</sup> Press Briefing by Robert Bell, Special Assistant to the President for National Security Affairs; Ted Warner, Assistant Secretary of Defense for Policy, Strategy and Threat Reduction, Federal Document Clearing House Transcript, Sept. 1, 1998, available in LEXIS, News Library, FDCH File.

statement . . . makes specific mention of the possibility of establishing such a common center operated by the United States and Russia.<sup>3</sup>

When asked whether the agreement permits either country to withhold data about particular launches, or if disclosure was mandatory for all launches, Bell responded that he did not wish to speculate "about what might or could be withheld," adding that leaving out particular launches was "not the general direction." Bell also informed the journalists at the conference that the final plan was expected to be ready for the governments to approve within a few months, and, judging from past experience with similar sharing arrangements, estimated that the agreement would be operational "in a year or two." Finally, Bell explained that this should begin as a bilateral arrangement, and that any extensions to other countries could be considered later.<sup>4</sup>

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## INTERNATIONAL DECISIONS

EDITED BY BERNARD H. OXMAN

*Humanitarian law—groups protected from genocide—rape and sexual violence as international crimes—incitement to genocide—class of perpetrators who may violate common Article 3 of 1949 Geneva Conventions and Protocol Additional II*

PROSECUTOR v. AKAYESU, Case ICTR-96-4-T.

International Criminal Tribunal for Rwanda, September 2, 1998.

This pioneering opinion marks the first time an international criminal tribunal has tried and convicted an individual for genocide and international crimes of sexual violence. The case arose out of the massacres of perhaps a million Tutsi in Rwanda in 1994.<sup>1</sup> At least two thousand died in Taba, a rural commune where defendant Jean-Paul Akayesu was mayor.<sup>2</sup> A trial chamber of the International Criminal Tribunal for Rwanda concluded that, although Akayesu may at first have tried to prevent killings, he eventually donned a military jacket and participated in or ordered atrocities. The Tribunal found him guilty of one count each of genocide and incitement to commit genocide and seven counts of crimes against humanity.<sup>3</sup> It acquitted Akayesu of five counts brought under common Article 3 of the 1949 Geneva Conventions and Protocol Additional II to those Conventions on the ground that he was not within the class of perpetrators contemplated by them.<sup>4</sup>

The opinion first surveyed the history of the conflict in Rwanda. Tutsi had at one time been the nobility, ruling over the more populous Hutu. By the turn of the century, these labels referred not so much to groups as to individuals, who might move from one group to another through marriage or financial change. But German colonizers, perceiving Tutsi to be more like them in height and color, established Tutsi as the indigenous elite. In the 1930s, the Belgians, who had succeeded the Germans, solidified the distinction and reserved benefits such as education to members of the preferred group. Thus, when indigenous political parties formed in the mid-1950s, they organized themselves along group rather than ideological lines. Independence increased unrest as Tutsi exiles, called *inyenzi*, or cockroaches, periodically attacked the Hutu-led Government. Hutu propaganda campaigns spread pejorative myths that fomented distrust. By 1994, the

<sup>1</sup> Case ICTR-96-4-T, Judgement, §2 (Sept. 2, 1998) (Kama, Aspegren, Pillay, JJ.) [hereinafter Judgement]. In July 1994, the Tutsi-led Rwandan Patriotic Front seized control, which it holds to this day. *Id.*

<sup>2</sup> *Id.*, §5.2.1.

<sup>3</sup> Rwanda's former Prime Minister, who had pleaded guilty to genocide, was sentenced to life in prison two days after this judgment. See James C. McKinley, Jr., *Ex-Rwandan Premier Gets Life in Prison on Charges of Genocide in '94 Massacres*, N.Y. TIMES, Sept. 5, 1998, at A4. Akayesu received three life sentences plus 80 years in prison; he has appealed. Ann M. Simmons, *Prosecutor's Convictions Span the World Law*, L.A. TIMES, Oct. 3, 1998, at A1.

<sup>4</sup> It also acquitted him of a count charging complicity in genocide, having found him guilty as a principal. Judgement, §§6.3.2, 7.8. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II], June 8, 1977, Art. 17, 1125 UNTS 609.

groups perceived each other as separate, ethnic, enemies. The death of Rwanda's President in a plane crash provoked Hutu to kill, maim, beat and rape Tutsi.<sup>5</sup>

Do the Tutsi, the Tribunal asked, constitute a group protected against genocide? Both the ICTR Statute and the Genocide Convention proscribe acts "committed with intent to destroy . . . a national, ethnical, racial or religious group."<sup>7</sup> Hutu and Tutsi shared nationality, race and religion. They also partook of "a common language or culture." The Tribunal concluded that they were not, as a technical matter, separate ethnic groups.<sup>8</sup>

The Tribunal nevertheless discerned from records of the Genocide Convention the intent to protect not just the four enumerated groups but "any group, similar . . . in terms of its stability and permanence."<sup>9</sup> Such group membership must be "determined by birth," "in a continuous and often irremediable manner," in contrast with "the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups."<sup>10</sup> Decades of discrimination—by custom of patrilineal descent<sup>11</sup> and by laws, such as that requiring cards that identified each person by the *akazi*, or ethnic group, of Hutu or Tutsi<sup>12</sup>—had led the Tutsi to be regarded as a distinct, stable, permanent group.<sup>13</sup> Victims were selected in 1994 not as individuals, but because of this perceived ethnic difference.<sup>14</sup> In particular, Akayesu, through his speeches, orders and actions, had demonstrated a specific intent to destroy Tutsi as an ethnic group. Thus, he was found guilty of genocide for actually participating in beatings, killings and rapes of Tutsi in some instances, and encouraging, abetting or ordering such acts in others.<sup>15</sup>

Rape was not among the initial charges against Akayesu. After witnesses testified about sexual assaults, pressure by Judge Pillay, the sole woman on the panel, and by human rights groups resulted in further investigation and an amended indictment.<sup>16</sup> The Tribunal was accordingly required to determine when sexual violence constitutes an international crime. It recognized that municipal rape laws often depend on a "mechanical description" of specific methods of assault.<sup>17</sup> Taking its lead, however, from the Convention against Torture, the Tribunal opted for a broader definition, "more useful in international law."<sup>18</sup> Both torture and rape, it noted, are crimes that violate personal dignity and that often further specific purposes like "intimidation, degradation, humil-

<sup>5</sup> *Id.*, §2. He and Burundi's President, also killed in the crash, had just attended a meeting to discuss Hutu-Tutsi power sharing. *Id.*

<sup>6</sup> *See id.*, §§6.3.1, 7.8. Count 1 of the indictment alleged killings, beatings and sexual violence, as genocide. *Id.*, §§1.2, 7.8. These alleged acts also provided the bases for convictions for crimes against humanity. *See id.*, §§1.2, 7.2–7.4, 7.6–7.7, 7.9.

<sup>7</sup> Statute of the International Tribunal for Rwanda, Art. 2(2), SC Res. 955, annex (Nov. 8, 1994), *reprinted in* 33 ILM 1602, 1603 (1994) [hereinafter ICTR Statute]; Convention on the Prevention and Punishment of the Crime of Genocide, Art. II, Dec. 9, 1948, 78 UNTS 277 [hereinafter Genocide Convention].

<sup>8</sup> Judgement, §6.3.1; *see id.*, §3. The ICTR Statute, unlike other instruments, in Article 3 also requires proof of protected status for all crimes against humanity. Compare ICTR Statute, *supra* note 7, Art. 3 with Statute of the International Tribunal for the Former Yugoslavia, Art. 5, UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192, 1193 (1993) (requiring showing of protected status only in case of persecution); Rome Statute of the International Criminal Court, July 17, 1998, Art. 7(1), UN Doc. A/CONF.183/9\*, *reprinted in* 37 ILM 999 (1998) [hereinafter Rome statute] (same). Because Article 3 expressly protects political groups, however, the defendant may be held liable for crimes against humanity committed against Tutsi.

<sup>9</sup> Judgement, §7.8; *see id.*, §6.3.1 (citing summary records of the meetings of the Sixth Committee of the General Assembly, pt. 1, 21 September–10 December 1948).

<sup>10</sup> *Id.*, §6.3.1.

<sup>11</sup> *Id.*, §5.1; *see id.*, §3.

<sup>12</sup> *Id.*, §§5.1, 7.8; *see id.*, §3.

<sup>13</sup> *Id.*, §7.8; *see id.*, §5.1.

<sup>14</sup> *Id.*, §§3, 7.8.

<sup>15</sup> *Id.*, §7.8.

<sup>16</sup> *Id.*, §5.5; *see id.*, §§1.2, 1.4.1; Bill Berkeley, *Judgment Day*, WASH. POST MAG., Oct. 11, 1998, at W10.

<sup>17</sup> Judgement, §6.4; *see id.*, §7.7.

<sup>18</sup> *Id.*, §6.4; *see id.*, §7.7. *See also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 UNTS 85.

iation, discrimination, punishment, control or destruction of a person.”<sup>19</sup> Indeed, rape committed with the aid of a public official is torture. The Tribunal thus defined “rape”—listed as a crime against humanity in the ICTR Statute—“as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>20</sup> It defined “sexual violence”—a crime it derived from other provisions of the Statute—as “any act of a sexual nature which is committed on a person under circumstances which are coercive.”<sup>21</sup> Within the latter category are affronts like forcing a student to perform gymnastics naked. Coercion, the Tribunal stressed, includes not only “physical force,” but also “[t]hreats, intimidation, extortion and other forms of duress,” such as the existence of armed conflict and the presence of armed militants.<sup>22</sup>

The Tribunal credited the testimony of several victims and eyewitnesses—each designated not by name but by letters—rather than Akayesu’s “bare denial” that sexual violence had occurred.<sup>23</sup> Thus, it found him guilty of crimes against humanity and genocide for aiding, abetting, ordering, or encouraging, and sometimes witnessing, more than two dozen rapes and other sexual assaults at the bureau communal where, by dint of his authority, he could have prevented them.<sup>24</sup>

Akayesu’s encouragement of crimes led to his conviction on an additional charge of direct and public incitement to commit genocide, proscribed both in the ICTR Statute and in the Genocide Convention.<sup>25</sup> After a review of national laws in common law and civil law systems, the Tribunal held that the Statute is violated when a person, in a public place or through a mass medium, directly encourages or persuades another to commit genocide, with the specific intent that the person’s acts contribute to the destruction of a protected group.<sup>26</sup> It found Akayesu guilty of this crime for having publicly urged a crowd “to unite in order to eliminate what he termed the sole enemy,” in a manner understood as a call “to kill the Tutsi,” some of whom he named explicitly.<sup>27</sup> As intended, his speech “did lead to the destruction of a great number of Tutsi in the commune of Taba.”<sup>28</sup>

The prosecutor had also alleged that Akayesu had violated Article 4 of the ICTR Statute by committing serious violations of both common Article 3 of the 1949 Geneva Conventions and the 1977 Protocol Additional II to those Conventions.<sup>29</sup> The Tribunal concluded that customary international law supported the inclusion of common Article 3 and the Protocol, designed to extend humanitarian protection to victims of internal

<sup>19</sup> Judgement, §§6.4, 7.7.

<sup>20</sup> *Id.*, §§6.4, 7.7. See ICTR Statute, *supra* note 7, Art. 3(g).

<sup>21</sup> Judgement, §§6.4, 7.7. The Tribunal concluded that the “sexual violence” is “serious bodily or mental harm” constituting genocide, ICTR Statute, *supra* note 7, Art. 2(2)(b); an “inhumane ac[t]” constituting a crime against humanity, *id.*, Art. 3(i); and an “outrag[e] upon personal dignity” constituting a serious violation of Article 3 common to the 1949 Geneva Conventions, *id.*, Art. 4(e).

<sup>22</sup> See Judgement, §7.7.

<sup>23</sup> *Id.*, §5.5. The identities of witnesses remained secret to the public but were disclosed to the defense, *id.*, §§1.4.1, 4, thus avoiding one concern about the fairness of the first trial before the International Criminal Tribunal for the former Yugoslavia. See, e.g., Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AJIL 235 (1996) (criticizing ruling that identities of victim-witnesses could be withheld from defense).

<sup>24</sup> Judgement, §7.7. For acts of rape and sexual violence to constitute these international crimes, other elements needed to be shown. To be genocide, they had to have been committed with the intent to destroy a protected group. To be crimes against humanity, they had to have been part of a widespread or systematic attack against a civilian population. The Tribunal held that the prosecution had proved these additional elements. See *id.*, §§7.7, 7.8.

<sup>25</sup> ICTR Statute, *supra* note 7, Art. 2(3)(c); Genocide Convention, *supra* note 7, Art. III(c).

<sup>26</sup> Judgement, §6.3.3.

<sup>27</sup> *Id.*, §7.5.

<sup>28</sup> *Id.*

<sup>29</sup> Judgement, §§1.2, 7.1.

armed conflicts, in its Statute.<sup>30</sup> But it refrained from holding Akayesu criminally liable under the provisions. It reasoned that, because the provisions purport to protect victims of armed conflicts, they are designed to constrain the activity of "persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities."<sup>31</sup> This would encompass all military personnel and some civilians. The latter, however, must have been "legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts."<sup>32</sup> Finding insufficient proof that Akayesu fell within this category, the Tribunal acquitted him of all charges under Article 4 of the ICTR Statute.<sup>33</sup>

\* \* \* \*

The Tribunal's ruling on sexual violence is but one of many intriguing international law issues addressed by this case. That the Tribunal extended protection to a group not among the four enumerated groups might surprise those familiar with the debates that led to the exclusion of other groups, particularly political or social groups, from the Genocide Convention.<sup>34</sup> Yet the enumerated groups are not defined in either the Convention or the Statute; in particular, the scope of the term "ethnic" remains in dispute.<sup>35</sup> Though Tutsi may not be an ethnic group within the strict definition, they share characteristics of the enumerated groups. Tutsi membership was defined at birth and, within the Rwandan social and legal system, remained for life. Both the victims and the perpetrators considered themselves to belong to separate ethnic groups. Tutsi identity was thus immutable, stable and permanent. The decision of the Tribunal to treat the Tutsi as if it were an enumerated group properly recognizes the role of socially imposed discrimination in establishing group identity.<sup>36</sup> It evinces the kind of flexibility that drafters of the Convention had, in fact, endorsed.<sup>37</sup>

On the other hand, the decision is unlikely to bring political or economic groups within the ambit of genocide. Membership in those groups is mutable and is neither dependent on birth nor readily recognized by the larger society. Moreover, the text of the ICTR Statute links the protected groups to the specific intent of the defendant. Akayesu regarded Tutsi as a separate ethnic group and chose his victims out of a belief that to harm them would help destroy their group. These factors also justified his conviction for genocide.<sup>38</sup>

<sup>30</sup> *Id.*, §6.5 (citing, inter alia, Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-AR72, paras. 116-17, *Id.* (Oct. 2, 1995), reprinted in 35 ILM 32 (1996) [hereinafter *Tadić Appeals Chamber Decision*]).

<sup>31</sup> *Id.*, §6.5.

<sup>32</sup> *Id.*

<sup>33</sup> Judgement, §7.1.

<sup>34</sup> See 1948-49 U.N.Y.B. 954, 957; 1947-48 U.N.Y.B. 597-98.

<sup>35</sup> See Report on the Study of the Question of the Prevention and Punishment of the Crime of Genocide, UN Doc. E/CN.4/Sub.2/416, paras. 69-73 (1978), reprinted in 1 INTERNATIONAL CRIMINAL LAW 293 (M. Cherif Bassiouni ed., 1986). Whereas the Tribunal focused on the common language and culture of Hutu and Tutsi, this source suggests that "descent" and "kinship ties," characteristics Hutu and Tutsi might not share, see Judgement, §§3, 5.1, help determine what an ethnic group is.

<sup>36</sup> Recent scholarship maintains that ethnic, even racial, group membership is the product of social construction rather than heredity. See, e.g., STEPHEN JAY GOULD, THE MISMEASURE OF MAN 391-412 (2d ed. 1996); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 54-55 (2d ed. 1994).

<sup>37</sup> See JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 1083 (1996). France extends protection not only to the four enumerated groups, but also to any "group determined by any arbitrary criteria." C. PÉN. (NOUVEAU) ART. 211-1 (Fr.).

<sup>38</sup> Similarly, the trend for hate-crimes laws in the United States is to enhance punishment of one who commits a crime because of the victim's group identity, actual or perceived. See CAL. PENAL CODE §422.7 (West 1998); Federal Hate Crimes Prevention Act of 1998, S. 2484, 105th Cong., §3700 (1998).

The convictions for involvement in rapes and other sexual violence culminated a long campaign to have rape treated not as a "trophy" but as a crime of war.<sup>39</sup> The development was particularly appropriate in this instance: testimony indicated that victims were chosen because of their group identity, in order to wreak destruction on the group as a whole.<sup>40</sup> Likewise, the choice of a definition focusing on the concept of rape rather than on methodological detail properly reflects the aim of international humanitarian law to give full protection to the most vulnerable victims.<sup>41</sup> By requiring proof of both physical, sexual invasion and coercion for a rape conviction, the Tribunal fashioned a standard that is sufficiently precise and within accepted definitions to give notice of forbidden conduct. The definition of "sexual violence" may be another matter. Unlike rape, this crime is not specified in the ICTR Statute. The Tribunal inferred it from proscriptions against "inhumane acts," acts causing "serious bodily or mental harm," and "outrages against personal dignity," terms themselves indefinite. Furthermore, the Tribunal included within the meaning of sexual violence "any act of a sexual nature" involving coercion. Though the sexual mistreatment described by witnesses cries out for punishment, a clear, established definition would have obviated any risk of the kind of criticism based on the principle of *nullum crimen sine lege* that dogged the Nuremberg trials.<sup>42</sup>

Criminal punishment for incitement might, in the abstract, also give pause to civil libertarians. In this case, however, the Tribunal carefully applied elements drawn from the text of the Statute. It thus required that the words forming the gravamen of the crime were uttered in a public place; that the speaker had intended the words to provoke immediate, genocidal violence; and that the speaker had conveyed this intent to the listeners in a direct manner. Each element was proved; indeed, Akayesu's speech actually touched off killings and other assaults. Even according to U.S. Supreme Court doctrine, his words did not deserve protection.<sup>43</sup>

The Tribunal itself voiced a concern based on *nullum crimen* respecting the prosecution's effort to hold Akayesu liable for violations of common Article 3 and Protocol Additional II. Its effort to accommodate the principles that civilians may be guilty of war crimes and that convictions ought to be based upon customary international law is admirable. But its standard for civilian liability is unduly high, in that it excludes Akayesu, an elected official who held chief executive power in his community, who was a local representative of the national Government, and who gave some assistance to the Government's war effort. In contrast, opinions of the Tribunal for the Former Yugoslavia in *Tadić* suggest that everyone may be held criminally liable.<sup>44</sup> Unless the standard of the Rwanda Tribunal is relaxed on appeal, far too many civilians will escape responsibility for committing war crimes against noncombatants caught in the middle of internal armed conflict.

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<sup>39</sup> Berkeley, *supra* note 16 (quoting Judge Pillay). Cf. Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424 (1993) (arguing for prosecution of rape as an international crime).

<sup>40</sup> See Judgement, §7.8 (stating that "[s]exual violence was a step in the process of destruction of the Tutsi group").

<sup>41</sup> See Prosecutor v. Erdemović, Judgement, No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 75 (Oct. 7, 1997).

<sup>42</sup> In recognition of this concern, the statute for the proposed international criminal court calls for adopting specific elements of crimes within its jurisdiction. Rome statute, *supra* note 8, Art. 9.

<sup>43</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (permitting proscription of speech "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action").

<sup>44</sup> *Tadić* Appeals Chamber Decision, *supra* note 30, paras. 128-37; Prosecutor v. Tadić, Opinion and Judgment, No. IT-94-1-T, paras. 609-17, 661-88 (May 7, 1997), excerpted in 36 ILM 908 (1997).

*European Community—human rights—discrimination against lesbians and gay men in the workplace—interpretation of Article 119 of the Treaty of Rome and Equal Pay Directive of the European Community—meaning of “discrimination based on sex”*

GRANT v. SOUTH-WEST TRAINS, LTD. Case C-249/96. 1998 All England Law Reports (EC) 193, <<http://curia.eu.int/en/index.htm>>.

Court of Justice of the European Communities, February 17, 1998.

Are employers within the European Community (EC or Community) forbidden from discriminating against their employees on the basis of sexual orientation? More generally, does the prohibition of “discrimination based on sex” contained in Article 119 of the Treaty of Rome and the Community directive requiring equal pay for men and women (Equal Pay Directive)<sup>1</sup> encompass discrimination on the basis of sexual orientation? In *Grant v. South-West Trains, Ltd.*, the European Court of Justice (ECJ) answered both questions in the negative, rejecting a strongly worded recommendation of the Court’s Advocate General.<sup>2</sup>

Lisa Grant was an employee of South-West Trains, Ltd. (SWT), formerly a part of British Rail. As part of its standard compensation package, SWT offered free or reduced-price travel passes to the “legal spouses” of its employees. The railway also issued passes to employees’ “common law opposite sex spouses” if the partners had declared that “a meaningful relationship has existed for a period of two years or more.”<sup>3</sup> In 1995 Grant applied for a travel pass for her female partner, with whom she had had a meaningful relationship for more than two years. SWT refused to issue the pass, claiming that travel benefits for its employees’ unmarried partners could be granted only to partners of the opposite sex.

Grant challenged her employer’s position before an industrial tribunal, arguing that SWT’s refusal constituted sex discrimination in violation of the British Equal Pay Act 1970, Article 119 of the Treaty of Rome, and the Equal Pay Directive. Although noting that courts in the United Kingdom had repeatedly rejected the argument that discrimination on the basis of an employee’s sexual orientation is a form of sex discrimination, the tribunal reasoned that the ECJ’s 1996 decision in *P v. S and Cornwall County Council*<sup>4</sup> left the issue sufficiently ambiguous to warrant a reference to the Court for an advisory ruling. In *P v. S*, the ECJ had held that the Community’s Equal Treatment Directive,<sup>5</sup> which prohibits employment discrimination “on grounds of sex,” precluded the dismissal of a male-to-female transsexual because of her gender reassignment. Rejecting the arguments of the United Kingdom and the EC Commission, the Court stated that “the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex.”

Advocate General Michael Elmer’s opinion and recommendation in the *Grant* case interpreted *P v. S* as “a decisive step away from an interpretation of the principle of equal treatment based on the traditional comparison between a female and a male employee.” SWT’s benefit policy was a direct form of sex discrimination because it conditioned the granting of a rail pass both on the sex of the employee (by requiring an employee to be

<sup>1</sup> TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, Art. 119, 298 UNTS 11; Council Directive 75/117 on the Approximation of the Laws of the Member States relating to the Application of the Principle of Equal Pay for Men and Women, 1975 O.J. (L 45) 19.

<sup>2</sup> Opinion of Advocate General Michael B. Elmer (Sept. 30, 1997), 1998 All E.R. (EC) 193 [hereinafter Elmer Opinion].

<sup>3</sup> Case C-249/96, para. 5 [hereinafter Judgment].

<sup>4</sup> Case C-13/94, [1996] 2 C.M.L.R. 247, 1996 All E.R. (EC) 397.

<sup>5</sup> Council Directive 76/207 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, Art. 2(1), 1976 O.J. (L 39) 40 (“there shall be no discrimination whatsoever on the grounds of sex”).



the opposite sex of his or her partner) and on the sex of the partner (who was required to be of the opposite sex of the employee). That the rail pass policy did not "refer to a specific sex as the criterion for discrimination, but lays down a more abstract criterion ('opposite sex') can . . . make no difference, since the decisive point, as laid down in *P v. S* is whether discrimination is exclusively or essentially based on sex." Elmer concluded that SWT could not justify its discriminatory policy on the basis of its private conceptions of morality, which disfavored same-sex partnerships, reasoning that such a stance is inconsistent with fundamental principles of Community law.<sup>6</sup>

The ECJ rejected this reasoning. First, it concluded that SWT's rail pass policy did not classify its employees on the basis of their sex. It construed the railway's policy as merely requiring an employee to live in a stable relationship with a person of the opposite sex to receive the travel benefits. Because such a restriction "applies in the same way to female and male workers," i.e., because "travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex," SWT's benefit requirements did not discriminate on the basis of sex.<sup>7</sup>

Second, the Court considered whether same-sex couples in a "stable relationship" are situated similarly to married heterosexual couples or to unmarried heterosexuals in a stable relationship. It noted that, although a few EC member states regulate same-sex partnerships in a manner "equivalent to marriage," most treat such relationships as comparable to unmarried heterosexual partnerships only for limited purposes, or else they do not recognize same-sex relationships at all. It also referred to decisions by the European Commission on Human Rights holding that stable same-sex relationships do not fall within the ambit of the right to respect for family life protected by the European Convention on Human Rights,<sup>8</sup> and that government policies granting preferential treatment to married and unmarried heterosexual couples do not violate same-sex couples' right to nondiscrimination protected by the Convention. Given this legal landscape, the ECJ concluded that employers were not required to treat homosexual and heterosexual relationships equivalently.<sup>9</sup>

Finally, the Court considered whether "differences of treatment based on sexual orientation are included in the 'discrimination based on sex', prohibited by Article 119 of the Treaty." Grant relied on two decisions to support this interpretation: the ECJ's two-year-old decision in *P v. S*, and a 1994 decision of the United Nations Human Rights Committee, which, in concluding that a criminal ban on consensual homosexual sodomy is incompatible with the International Covenant on Civil and Political Rights,<sup>10</sup> had stated that the word "sex" in the Covenant's nondiscrimination clause includes sexual orientation.<sup>11</sup> Without explanation, the Court limited *P v. S* to its facts. As for the Committee, which the Court described as "not a judicial institution and whose findings

<sup>6</sup> Elmer Opinion, note 2 *supra*, paras. 15, 25, 35–43. See also *id.*, para. 17 ("The delimitation of the scope of Article 119 must be kept free from conceptions of morality which may vary from Member State to Member State and change with time.").

<sup>7</sup> Judgment, paras. 27–28.

<sup>8</sup> European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 8, 213 UNTS 222.

<sup>9</sup> Judgment, paras. 29–36.

<sup>10</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

<sup>11</sup> *Toonen v. Australia*, Communication No. 488/1992, UN GAOR, 49th Sess., Supp. No. 40, Vol. 2, at 226, UN Doc. A/49/40 (1994). Although its determinations are not formally binding, the Committee's recent practice has been to treat its "views" as to whether the treaty has been violated as imposing an obligation on states to implement them. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 338–45 (1997).

have no binding force in law," the ECJ criticized its approach as unsupported by "specific reasons" and at odds with how other human rights tribunals and review bodies had interpreted the ban on sex discrimination.

Having concluded that Community law "as it stands at present" did not offer Grant any relief, the Court observed that the Treaty of Amsterdam, signed on October 2, 1997, but not yet ratified by the member states, will authorize the EC Council, on the basis of a unanimous vote on a proposal from the EC Commission, to enact legislation to ban various forms of discrimination, including discrimination based on sexual orientation.<sup>12</sup>

\* \* \* \*

The ECJ's ruling is problematic for several reasons. First, the Court ignored the fact that SWT's policy, like any statute or regulation that classifies an individual or couple on the basis of sexual orientation, also, and at the same time, classifies on the basis of sex. The sex discrimination argument in *Grant* can be illuminated by shifting the focus from Grant's status as a woman in a lesbian relationship to her sex itself. As Robert Wintemute has explained, if a SWT employee wishes to receive benefits for a life partner, that employee's choice of partners is restricted on the basis of sex:

Who may choose a male partner? Only women, not men. Who may choose a female partner? Only men, not women. . . . Being attracted to men is acceptable in a woman but not in a man, and being attracted to women is acceptable in a man but not in a woman. [Under the SWT policy, a] woman with a female partner compares herself with a man with a female partner and argues that, "but for" her sex or if she were a man, her female partner would receive a particular benefit.<sup>13</sup>

The ECJ's response to this argument—that SWT treats women and men alike because neither female nor male employees receive benefits for their same-sex partners—is unpersuasive. First, such a comparison "avoids a finding of direct sex discrimination by changing not only the sex of the [employee] but also the sex of [the employee's] partner," whereas a proper sex discrimination analysis compares the sex of male and female employees and holds all other factors constant.<sup>14</sup> Second, the ECJ's response fails to recognize that, if a decision to award a valuable benefit is made by referring to a person's sex, that decision cannot be neutral with reference to sex.<sup>15</sup> The Court had recognized precisely this point in *P v. S* when it rejected the employer's claim that dismissing a male-to-female transsexual was not an act of sex discrimination because a female-to-male transsexual would also have been fired.<sup>16</sup> Finally, by failing to recognize discrimination on the basis of sexual orientation as a form of sex discrimination, the ECJ overlooked the ways in which antigay animus reinforces the inequality of the sexes and women's subordinate position in society by entrenching the stereotypes associated with traditional sex roles.<sup>17</sup> The Court thus missed an important opportunity to further the underlying goals of the EC's sex discrimination legislation and to promote the equality of treatment that is a fundamental principle of Community law.

<sup>12</sup> Treaty of Amsterdam, Oct. 2, 1997, Art. 13 (amending Treaty on European Union, Art. 6a), reprinted in 37 ILM 56, 82 (1998).

<sup>13</sup> Robert Wintemute, *Recognizing New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 MOD. L. REV. 334, 344 (1997). See also Andrew Koppelman, *Why Discrimination against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994).

<sup>14</sup> Wintemute, note 13 *supra*, at 347-48.

<sup>15</sup> See Andrew Koppelman, *Three Arguments for Gay Rights*, 95 MICH. L. REV. 1636, 1661 (1997). Indeed, the ECJ's view of neutrality is the same as that adopted by courts in 19th-century America to uphold antimiscegenation laws. *Id.*

<sup>16</sup> Case C-13/94, *supra* note 4, para. 7.

<sup>17</sup> For a detailed discussion, see Koppelman, note 13 *supra*, at 234-72.

Two further arguments, however, can be advanced to defend the ECJ's ruling. First, it might be asserted that the drafters of the EC Treaty and its sexual equality directives never intended to include discrimination against lesbians and gay men within the protections of Community law. Yet the ECJ has been an ardent proponent of a purposive, teleological method of interpretation that seeks to achieve the basic objectives of the Treaty and Community legislation even if the drafters did not envision the Court's response to a particular problem.<sup>18</sup> If the drafters' intent to bar discrimination between men and women did not deter the Court in *P v. S* from invoking the Community's goals of promoting equality and eradicating gender stereotyping as a justification for extending the EC's sex discrimination ban to transsexuals, then those same objectives justified a decision in favor of Lisa Grant, notwithstanding the drafters' failure to provide express legal protections for lesbians and gay men.<sup>19</sup>

Second, the ECJ's decision might be justified by recent amendments to the Community's foundational international agreement. For the first time in the Community's history, the 1997 Treaty of Amsterdam provides a specific mechanism for the EC political bodies to enact legislation to ban discrimination against lesbians and gay men. The Court might have been reluctant to interpret existing Community laws to prohibit discrimination based on sexual orientation, when the member states had so recently provided other means for addressing this issue. Yet in the past it has not hesitated to extend the sex discrimination ban to situations that the EC political bodies were simultaneously addressing through specific legislation.<sup>20</sup> It must also have been aware that the time-consuming process of ratifying the new Treaty and the unanimous vote required before any legislation could be adopted meant that the competence granted to the Community "may not be exercised for many years, if ever."<sup>21</sup>

Even assuming, however, that the Court wanted to extend the protections of Community law to lesbians and gay men, the options before it were stark. Had it chosen to rule in Grant's favor, in a single stroke it would have brought a ban on discrimination based on sexual orientation into the heartland of Community legal norms to be applied at all levels of its competence: acts by Community institutions themselves, acts by member states and their political subdivisions, and acts by private parties bound by the Community's sexual equality rules under the principle of direct effect. Moreover, the stringent standards that the ECJ applies to direct gender discrimination would have made it difficult to justify any differential treatment of homosexuals. Had the ECJ adopted Grant's argument, lesbians and gay men would have moved from being legal outcasts within the Community to being the beneficiaries of discrimination protections not afforded to racial and religious minorities and the disabled.<sup>22</sup> The widespread and

<sup>18</sup> With respect to the ECJ's interpretive methods, see Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights under the European Community's Legal Order*, 37 HARV. INT'L L.J. 307, 340-42, 374 (1996); Philip Britton, *The Rainbow Flag, European and English Law: New Developments on Sexuality and Equality*, 8 IND. INT'L & COMP. L. REV. 261, 303-04 (1998).

<sup>19</sup> In *P v. S*, the Advocate General stated that "in Community law there is no precise provision specifically and literally intended to regulate the problem" of workplace discrimination against transsexuals, and that the drafters' "purpose" in enacting the Equal Treatment Directive was to bar "discrimination between men and women." Case C-13/94, *supra* note 4, paras. 24, 21. Neither fact deterred the Court from relying on the Community's fundamental "principle of equality" to extend the directive to bar adverse employment actions against transsexuals.

<sup>20</sup> Wintemute, note 13 *supra*, at 352 (citing *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, 1990 ECR I-3941, as interpreting the Equal Treatment Directive to protect pregnant workers notwithstanding a pending proposal to adopt a specific directive on discrimination against pregnancy).

<sup>21</sup> Wintemute, note 13 *supra*, at 351-52.

<sup>22</sup> These minority groups do not currently enjoy discrimination protection under EC law but, like lesbians and gay men, may be the subject of future Community legislation under the competence granted to the EC Council in the 1997 Treaty of Amsterdam.

pervasive discrimination against sexual minorities throughout European society<sup>23</sup> certainly justified such a ruling as furthering the Community's commitment to equality. But faced with a choice between comprehensive legal protection or none at all, the Court chose to defer to the member states and adopt the latter, politically safer course.

The ruling that equal treatment of same-sex and opposite-sex couples is not a part of the human rights principles protected by the Community is also problematic. As the Court correctly noted, the decisions of international tribunals and the laws of most member states do not currently treat the two groups equivalently. However, a trend toward greater legal protections for lesbians and gay men is emerging, particularly as regards discrimination against individuals.<sup>24</sup> The ECJ overlooked this trend, concluding from its survey of the current legal landscape that EC law "as it stands at present does not cover discrimination based on sexual orientation" and that the issue "is for the legislature alone" to address.<sup>25</sup> This suggests that the Court may decline in a future case to recognize and incorporate into its human rights jurisprudence the development of more widespread discrimination protection for lesbians and gay men in Europe, a result at odds with its prior case law.<sup>26</sup>

What does the *Grant* decision portend for future litigation and advocacy of lesbian and gay legal issues in the European Community? Most immediately, it means that the ECJ will not hear a pending challenge to the United Kingdom's ban on gays in the military under the Equal Treatment Directive. The British judge who referred the case to the ECJ has "reluctantly" withdrawn the reference for a preliminary ruling in light of *Grant*.<sup>27</sup> In a future case of *sexual orientation* discrimination, however, the Court may exhibit greater sympathy for the argument that the principle of equality, as shaped by evolving European human rights standards, bars discrimination against lesbians and gay men in areas falling within the Community's competence.<sup>28</sup> But for more comprehensive legal protections,

<sup>23</sup> See *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE* 71-178 (Kees Waaldijk & Andrew Clapham eds., 1993) (Detailed studies of legal, social and economic discrimination against lesbians and gay men in the Community).

<sup>24</sup> Three EC members (Denmark, the Netherlands, and Sweden) recognize same-sex partnerships or grant benefits to same-sex couples analogous to those granted unmarried heterosexuals. Eight (Denmark, Finland, France, Ireland, Luxembourg, the Netherlands, Spain and Sweden) bar sexual orientation discrimination in employment or the provision of public goods and services. In a 1994 resolution, the European Parliament urged member states to abolish all laws that discriminate against lesbians and gay men. Resolution on equal rights for homosexuals and lesbians in the European Community, 1994 O.J. (C 61) 40. In July 1997, the European Commission on Human Rights reversed two decades of settled jurisprudence and ruled that Britain's 16-year age of consent for gay men, as compared to a 16-year age of consent for heterosexuals and lesbians, violated the prohibition under the European Convention on Human Rights of discrimination on the basis of "sex" and "other status." *Sutherland v. United Kingdom*, App. No. 25186/94 <[www.dhcommhr.coe.fr/eng/25186R31.E.html](http://www.dhcommhr.coe.fr/eng/25186R31.E.html)>.

<sup>25</sup> Judgment, paras. 47, 36.

<sup>26</sup> In *The Netherlands v. Reed*, 1986 ECR 1283, 1300, the ECJ stated that it could give a "broad" or "dynamic" interpretation of Community legislation based on legal and social developments that "take into account the situation in the whole Community, not merely in one Member State." In *P v. S*, Case C-13/94, note 4 *supra*, the Court acted notwithstanding the Advocate General's conclusion that member states' laws concerning rights of transsexuals were in flux. See also Andrew Clapham & J. H. H. Weiler, *Lesbians and Gay Men in the European Community Legal Order*, in *HOMOSEXUALITY*, *supra* note 23, at 7, 37 (arguing that the ECJ can impose "more progressive standards than those common to all the Member States or contained in international instruments" when interpreting the principle of equality in EC law).

<sup>27</sup> *Regina v. Secretary of State for Defence ex parte Perkins*, 2 C.M.L.R. 1116 (1998) (withdrawing reference to ECJ). At present, nine EC members do not bar gays from military service (Austria, Belgium, Denmark, Finland, France, Ireland, the Netherlands, Spain and Sweden). Wintemute, note 13 *supra*, at 352 n.79.

<sup>28</sup> A challenge to a discriminatory policy of a Community institution itself may provide the most promising opportunity for such a claim. See Clapham & Weiler, note 26 *supra*, at 36-37. Although the EC Staff Regulation was recently amended to prohibit discrimination against Community employees on the basis of their sexual orientation, see 1998 O.J. (L 113) 4, the Community has refused to treat its employees' same-sex partnership contracts as equivalent to marriage contracts for purposes of awarding a household allowance. A challenge to that policy, supported by the Swedish Government, was rejected by the EC Court of First Instance on January

lesbians and gay men will need to lobby member states to ratify the Treaty of Amsterdam and then to support antidiscrimination legislation consistent with the powers granted to the EC political bodies by the new Treaty.

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*European Community–Yugoslavia Cooperation Agreement—suspension of trade concessions—Vienna Convention on the Law of Treaties—rebus sic stantibus clause—judicial review of Community acts for compliance with customary international law*

A. RACKE GMBH & CO. V. HAUPTZOLLAMT MAINZ. Case C-162/96.

Court of Justice of the European Communities, June 16, 1998.

The German Bundesfinanzhof (Federal Finance Court) asked the Court of Justice of the European Communities<sup>1</sup> whether an EEC Council regulation<sup>2</sup> suspending the trade concessions provided for by the 1980 Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia<sup>3</sup> was valid. The Court answered in the affirmative, holding that, in adopting the regulation, the Council had not acted contrary to the rules of customary international law concerning termination and suspension of treaty relations because of a fundamental change of circumstances.

These questions were originally raised in litigation between the German company A. Racke GmbH & Co. (Racke) and the Hauptzollamt Mainz (Mainz customs office). The Hauptzollamt, backed by the Finanzgericht (Finance Court of first instance), demanded that customs duties be paid for imports of wine from Kosovo after the entry into force of the EEC regulation on November 15, 1991. Racke claimed that the preferential rates laid down in Article 22(4) of the 1980 Cooperation Agreement still applied. It argued that the Agreement had been concluded, according to its Article 60, for an unlimited period and could be denounced only upon six months' notification. Since the Council had denounced the Agreement on November 25, 1991,<sup>4</sup> the preferential treatment had to be granted until May 26, 1992. Thus, the immediate suspension of the Agreement by the regulation violated the principle of *pacta sunt servanda*. Racke further contended that the reasons put forward in the regulation did not satisfy the conditions of the *clausula rebus sic stantibus*<sup>5</sup> and claimed that the regulation was null and void because the Community had violated customary international law.

The Court examined the validity of the regulation in three steps. First, it recalled its established jurisprudence that a provision of an agreement concluded by the Community with non-member countries is capable of conferring rights directly upon individuals if, when consideration is given to its wording and the nature and purpose of the agreement itself, the provision is seen to contain a clear and precise obligation that is not subject,

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28, 1999. D. v. Council, Case T-264/97 <<http://curia.eu.int/en/index.htm>>. It is uncertain whether the decision will be appealed to the ECJ.

<sup>1</sup> In a procedure under Article 177 of the TREATY ESTABLISHING THE EUROPEAN COMMUNITY [hereinafter Treaty], Mar. 25, 1957, 298 UNTS 11, as amended by TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1992 O.J. (C 224) 1.

<sup>2</sup> Council Regulation 3300/91 (Nov. 11, 1991), 1991 O.J. (L 315) 1.

<sup>3</sup> Apr. 2, 1980, 1983 O.J. (L 41) 1.

<sup>4</sup> Council Decision 91/602/EEC, 1991 O.J. (L 325) 23.

<sup>5</sup> See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, Art. 62, 1155 UNTS 331.

in its implementation or effects, to the adoption of any subsequent measure.<sup>6</sup> It concluded that Article 22(4) of the Agreement fulfilled these criteria.<sup>7</sup>

Second, the Court examined whether an individual may invoke the rights granted to him by such an agreement to challenge the validity of an EEC regulation on the grounds that it is inconsistent with the agreement and not justified by the customary international law of treaties. The Court reasoned as follows:

(45) It should be noted . . . that, as is demonstrated by the Court's judgment in . . . *Poulsen and Diva Navigation* . . . , the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country.

(46) It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.

The Court observed that *pacta sunt servanda* was a fundamental principle of every legal order.<sup>8</sup> Thus, Racke could not be denied the right to challenge the validity of the regulation by invoking the obligations deriving from rules of customary international law that govern the termination and suspension of treaty relations.<sup>9</sup>

Third, the Court considered whether the regulation could, in fact, be justified by a fundamental change of circumstances. Because of the complexity of the *clausula rebus sic stantibus*, the Court restricted judicial review to whether, by adopting the suspending regulation, the Council had made "manifest errors of assessment" concerning its application.<sup>10</sup> In view of the objective of the Agreement "to promote the development and diversification of economic, financial and trade cooperation," the Court found that the maintenance of peace in Yugoslavia, and the existence of institutions capable of ensuring implementation of the envisaged cooperation, constituted an essential condition for initiating and pursuing that cooperation.<sup>11</sup> The Council's assessment that "the pursuit of hostilities and their consequences on economic and trade relations constitute a radical change" was not manifestly erroneous. The condition of "radical change" does not require impossibility of performance.<sup>12</sup> The Court also observed that the procedural safeguards laid down in Article 65 of the Vienna Convention do not form part of customary law and accordingly did not prejudice the Community's action.<sup>13</sup> The Court concluded that the examination of the questions referred to it had disclosed no factor of such a kind as to affect the validity of the regulation.

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This is the first time that the Court has indicated, albeit in dictum, that customary international law prevails over secondary European Community (EC) law within the Community's legal order. In the earlier *Poulsen and Diva Navigation* case,<sup>14</sup> the Court had shown willingness to interpret a Community act in a manner consistent with

<sup>6</sup> Case C-162/96, Judgment, para. 31 [hereinafter Judgment].

<sup>7</sup> *Id.*, paras. 32-37.

<sup>8</sup> *Id.*, paras. 49-50.

<sup>9</sup> *Id.*, para. 51.

<sup>10</sup> *Id.*, para. 52.

<sup>11</sup> *Id.*, para. 55.

<sup>12</sup> *Id.*, paras. 56-57.

<sup>13</sup> *Id.*, paras. 58-59.

<sup>14</sup> See Case C-286/90, 1992 ECR I-6019, para. 9.

international law. In that case it restricted the scope of application of an EEC regulation concerning the conservation of fish stocks<sup>15</sup> so as to avoid conflict with the right of innocent passage under the customary international law of the sea. Since the question of whether customary international law would prevail over a clearly inconsistent Community act was not answered in *Poulsen and Diva Navigation*, the citation of that case by the Court does not necessarily support its assertion that the Community's internal legal order subjects Community acts to judicial review for compliance with customary international law. It cites no other authority in support of that proposition. Unfortunately, the opinion of Advocate General Jacobs<sup>16</sup> does not help in this respect, either.

These omissions do not mean, however, that the Court's conclusion cannot be supported. As long as there is no provision in the Treaty Establishing the European Community, the Court may apply, under Article 164, rules of constitutional value common to the member states.<sup>17</sup> The Constitutions of Germany, Austria, Italy, France, Greece and Portugal state that international customary law is part of municipal law.<sup>18</sup> The legal systems of Belgium, the Netherlands, Spain, Denmark, Ireland and Great Britain reach the same result under customary constitutional law.<sup>19</sup> In most of the member states, customary international law even prevails over statutes enacted by democratically elected parliaments, including statutes adopted *a posteriori*.<sup>20</sup> Thus, the Court's monistic view—unity of customary international law and Community law—with primacy of the former over secondary EC law,<sup>21</sup> correctly reflects the common denominator of the constitutional systems encompassed by the Community.

Given this far-reaching principle, a very important subsequent question arises: can an individual invoke any rule of customary international law to challenge the validity of an inconsistent Community act? In accepting Racke's invitation to inquire into whether the suspending regulation conformed to the principle of *pacta sunt servanda*, the Court seems to have been prepared to review EC legislation for consistency with an international EC agreement because the latter must be observed in good faith. The Court stated that applicants before the courts cannot be denied the right to invoke obligations resulting from the rules of customary international law on the termination and suspension of treaties.<sup>22</sup> If the aforementioned interpretation of the judgment is correct, the Court's long-standing view that only directly applicable international treaty provisions could be

<sup>15</sup> Council Regulation 3094/86, 1986 O.J. (L 288) 1.

<sup>16</sup> Case C-162/96, Opinion of Advocate General Jacobs (Dec. 4, 1997).

<sup>17</sup> On constitutional law aspects of the European Union, see Ingolf Pernice, *Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung*, in *THE EUROPEAN CONSTITUTIONAL AREA* 225 (Roland Bieber & Peter Widmer eds., 1995).

<sup>18</sup> Art. 25(1) of the German Basic Law, translated in 7 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gisbert H. Flanz eds., 1994); Art. 9 of the Constitution of Austria, 1 *id.* (1998); Art. 10 of the Constitution of Italy, 9 *id.* (1987); 14th consideration of the Preamble to the 1946 Constitution of France cited in the Preamble to the 1958 Constitution, 7 *id.* (1997); Art. 28(1) of the Constitution of Greece, *id.* (1988); and Art. 8(1) of the Constitution of Portugal, 15 *id.* (1991).

<sup>19</sup> See Luzius Wildhaber & Stephan Breitenmoser, *The Relationship between International Customary Law and Municipal Law in Western European States*, 48 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 163 (1988).

<sup>20</sup> *Id.*, with numerous references. Important exceptions are France and the United Kingdom.

<sup>21</sup> The relationship between customary international law and primary EC law remains unclear. Arguably, in the internal Community legal order, EC primary law prevails over customary law apart from *jus cogens*. See Frank Hoffmeister, *Die Bindung der Europäischen Gemeinschaft an das Völkergewohnheitsrecht der Verträge*, 9 *EUROPÄISCHES WIRTSCHAFTS- & STEUERRECHT* 365 (1998).

<sup>22</sup> Judgment, para. 51.

invoked by individuals<sup>23</sup> would be overturned. This change would apply, in particular, to GATT cases denying individuals the right to claim nonconformity of EC acts with the GATT.<sup>24</sup>

A careful reading of the judgment reveals, however, that the Court was very cautious about an individual's ability to challenge EC acts contrary to international agreements. According to paragraphs 27-36 and 47, an individual must first prove that a provision of the agreement is directly applicable to him so as to establish an individual right, and only then will the customary law rule of *pacta sunt servanda* come into play. Moreover, the Community itself had suspended the Agreement in question, relying on a principle of customary international law. Thus, the Court had only to confirm the suspending regulation, rather than declare a Community act void for noncompliance with customary international law.

As the *clausula rebus sic stantibus* under general international law applies only to exceptional cases,<sup>25</sup> the Court's reasoning in upholding the suspension is of some interest. The Court acknowledged the guiding authority of the International Court of Justice in interpreting customary international law principles by citing<sup>26</sup> two relevant cases on the *clausula* decided at The Hague.<sup>27</sup> However, while the World Court would inquire into the lawfulness of a suspension or termination under the international law of treaties, the European Court limits itself to deciding whether the competent EC institution has made a "manifest error of assessment." This self-restraint is consistent with the Court's jurisprudence in other fields of EC law.<sup>28</sup> When a complex economic situation must be scrutinized, the Court's review of acts by Community institutions is restricted to manifest errors of assessment and abuse of power.<sup>29</sup> Constitutional courts in Europe and the United States Supreme Court also apply a low level of scrutiny to foreign affairs matters.<sup>30</sup>

The Council's reasoning that the hostilities in the former Yugoslavia had resulted in a radical transformation of the extent of the obligations still to be performed is open to question. The war and the Federation's dismemberment might not have literally increased the Community's "burden of the obligation to be executed to the extent of rendering the performance something essentially different from that originally undertaken."<sup>31</sup> But the Council's suspension can be justified by a modern interpretation of the *clausula*. An essential change would occur if performance of an obligation resulted in illicit assistance to an internationally wrongful act.<sup>32</sup> Once Serbia and Montenegro committed acts of aggression against Croatia after it achieved independence on October

<sup>23</sup> See Joint Cases 267/81-269/81, SPI and SAMI, 1983 ECR 801, para. 23; Case 9/73, Schlüter, 1973 ECR 1135, para. 27; Joint Cases 21-24/72, International Fruit Co., 1972 ECR 1219, 1230.

<sup>24</sup> See Case C-280/93, Germany v. Council, 1994 ECR I-5039, 5072 (with further references).

<sup>25</sup> See Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment (ICJ Sept. 25, 1997), 37 ILM 162, para. 104 (1998). See also AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 144 (Peter Malanczuk ed., 7th rev. ed. 1997) (arguing that the *clausula* applies only to "extreme cases").

<sup>26</sup> Judgment, paras. 24, 50.

<sup>27</sup> Fisheries Jurisdiction (UK v. Ice.), Jurisdiction of the Court, 1973 ICJ REP. 3 (Feb. 2); Gabčíkovo-Nagymaros Project, *supra* note 25.

<sup>28</sup> See, e.g., Case C-70/94, Fritz Werner Industrieausrüstungen GmbH v. Federal Republic of Germany, 1995 ECR 3189; and Criminal Proceedings against Leifer, Case C-83/94, 1995 ECR 3231; and the note on these cases by Juliane Kokott & Beate Rudolf, 90 AJIL 286, 288-89 (1996).

<sup>29</sup> See Case C-156/87, Gestetner Holdings, 1990 ECR I-781, para. 63.

<sup>30</sup> See Thomas Giegerich, *Verfassungsrechtliche Kontrolle der auswärtigen Gewalt im europäisch-atlantischen Verfassungsstaat: Vergleichende Bestandsaufnahme mit Ausblick auf die neuen Demokratien in Mittel- und Osteuropa*, in GRUNDFRAGEN DER VERFASSUNGSGERICHTSBARKEIT IN MITTEL- UND OSTEUROPA 501 (Jochen Abr. Frowein & Thilo Marauhn eds., 1998).

<sup>31</sup> See Fisheries Jurisdiction, 1973 ICJ REP. at 21, para. 43.

<sup>32</sup> See Draft articles on State responsibility, Report of the International Law Commission on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No. 10, at 125, 134, pt. 1, Art. 27, UN Doc. A/51/10 (1996).



8, 1991, the obligation of indirect assistance to a criminal government violating Article 2, paragraph 4 of the UN Charter would be essentially different from trading with a peaceful Federation.

The precise questions posed in this case are unlikely to arise with much frequency in the future. The Community has begun to insert a special "non-fulfillment clause" into the human rights and democracy provisions of cooperation agreements negotiated with many states.<sup>33</sup> They give the Community the express right to suspend the agreement after consultation with the state concerned. Thus, the need to invoke a right of suspension under the *clausula rebus sic stantibus* will arise henceforth only with regard to older agreements.<sup>34</sup>

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*European Community—Maastricht Treaty—delegation of power to international organizations under Danish Constitution—right to democracy—power of Danish courts to review acts by Community organs*

DECISION CONCERNING THE MAASTRICHT TREATY. 1998 Ugeskrift for Retsvæsen, H 800.  
 Supreme Court of Denmark, April 6, 1998.

In this case the Danish Supreme Court decided that the ratification and the incorporation into Danish law of the Maastricht Treaty creating the European Union are consistent with the Danish Constitution of 1953. It also reserved the right for Danish courts to review Community decisions for consistency with the Act on Denmark's accession to the EC Treaty. This decision<sup>1</sup> is of vital importance to Denmark's relationship to the European Community (EC) and to the claims of direct effect and priority of EC law over national constitutions.<sup>2</sup>

The case arose following the second Danish referendum on ratification of the Maastricht Treaty. In the first referendum, a slim majority voted no. After negotiations with the other EC countries, Denmark was granted the option of making certain reservations pursuant to the so-called Edinburgh agreement. In 1993 the Maastricht Treaty (including the Edinburgh agreement) obtained the requisite majority of five-sixths in the Folketing (parliament). The Government nevertheless decided for political reasons to hold a new referendum on the Maastricht Treaty. In this referendum, a majority of the voters said yes. The Danish Government subsequently ratified the Treaty, which was then incorporated into Danish law.<sup>3</sup>

The plaintiffs based their challenge to the accession on two main points. First, they argued that the requirement for detailed specification of powers transferred to international authorities had not been fulfilled when Denmark ratified the Maastricht Treaty.

<sup>33</sup> See the present authors' report on ECJ Case C-268/94, 1996 ECR I-6177, in 92 AJIL 292 (1998).

<sup>34</sup> See 1980 O.J. (L 144) 1 (ASEAN); 1985 O.J. (L 250) 1 (China).

<sup>1</sup> An unofficial translation of the decision can be found on the Internet <[www.um.dk/udenrigspolitik/europa/domeng](http://www.um.dk/udenrigspolitik/europa/domeng)>.

<sup>2</sup> According to several Danish scholars, the formal decision to allow the case to be adjudicated was also a major constitutional breakthrough because for the first time a group of people without a direct legal interest were accorded *locus standi* to claim that an act was in contravention of the Danish Constitution. This decision by the Supreme Court of August 12, 1996, is reported in 1996 UFR H 1300. For a comment, see Henning Koch, *Dommeret*, in GRUNDLOVEN OG MENNESKERETTIGHEDER 326 (Morten Kjærsum et al. eds., 1997).

<sup>3</sup> Act No. 281 of Apr. 28, 1993, 1993 Lovtidende 1157.

Second, they argued that the extent of sovereignty transferred under Denmark's Act of Accession to the EC Treaty violated the principle of democracy, which is implied in the Danish Constitution.<sup>4</sup>

The Supreme Court identified the issue before it as whether the implementation in Denmark of the Treaty Establishing the European Community as framed in the Treaty Establishing the European Union was lawfully done in pursuance of section 20 of the Danish Constitution or, alternatively, whether such implementation required an amendment of the Constitution pursuant to section 88 thereof.<sup>5</sup>

Section 20 of the Danish Constitution allows the delegation of authority to international organizations, but the delegated authority must be not only specified (*bestemt*), but specified in some detail (*nærmere bestemt*).<sup>6</sup> The plaintiffs argued that the Community has now obtained so much autonomous authority that this requirement is no longer fulfilled. Although the general *acquis communautaire* played an important role in this argument, the most important point related to Article 235 of the Maastricht Treaty, which provides:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.<sup>7</sup>

The plaintiffs maintained that only a narrow reading of Article 235 can prevent it from being in contravention of the Danish Constitution, and that in fact Article 235 has been used in areas that clearly fall outside such a reading.<sup>8</sup> They conceded that the underlying idea of section 20 is to enable Denmark to participate, without amending the Constitution,<sup>9</sup> in international cooperation resulting in the exercise of legislative, administrative

<sup>4</sup> See 1998 UFR H 800, 858, 869.

<sup>5</sup> *Id.* at H 869, para. 9.1.

<sup>6</sup> Our translation. The crucial passage of section 20 reads: "Beføjelser, som efter denne grundlov tilkommer rigets myndigheder, kan ved lov i nærmere bestemt omfang overlades til mellemfolkelige myndigheder . . ." There are several different English translations of this section. See Henning Koch, *Constitutionalization of the Legal Order* 17 (National Report, 15th World Congress of Comparative Law, Bristol 1998). The difficulties relate more precisely to "i nærmere bestemt omfang." Koch proposes the translation "to a specified extent." See also Hjalte Rasmussen, *Denmark's Maastricht-ratification case: The constitutional dimension*, 33 IRISH JURIST 77 (1998). Rasmussen proposes the translation "to a more specified extent," *id.* at 38. In the unofficial translation of the decision by the Danish Ministry of Foreign Affairs, *supra* note 1, the Court quotes section 20 of the Danish Constitution as follows:

(1) Powers vested in the authorities of the Realm under this Constitutional Act may, to such extent as shall be provided by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation.

(2) For the enactment of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing (Parliament) shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in sect. 42.

*Id.*, para. 9.2.

<sup>7</sup> Article 308 according to the new enumeration in the Treaty of Amsterdam, Oct. 2, 1997, *reprinted in* 37 ILM 55, 140 (1998). For the Maastricht Treaty, Feb. 7, 1992, see TREATY ON EUROPEAN UNION, 1992 O.J. (L 205) 2, *reprinted in* 31 ILM 247 (1992).

<sup>8</sup> The question at issue was whether the adoption of Denmark's Act of Accession to the EC Treaty, as amended by the Maastricht Treaty, was constitutional. Thus, the constitutionality of the practice in relation to Article 235 prior to the amendment of the EC Treaty in 1992/1993 was not at issue in the case. Furthermore, the specific competences of the Community were expanded by the Maastricht Treaty, so that some matters previously dealt with under Article 235 are now expressly addressed by the Treaty.

<sup>9</sup> It is difficult to amend the Danish Constitution. Section 88 provides:

When the Parliament passes a Bill for the purposes of a new constitutional provision, and the Government wishes to proceed with the matter, writs shall be issued for the election of Members of a new Parliament. If the Bill passes unamended by the Parliament assembling after the election, the Bill shall

or judicial authority by an international organization with direct effect in Denmark. They argued, however, that the broad use of Article 235 of the EC Treaty proves that the transfer of powers was *not* properly specified in the Act of Accession.<sup>10</sup> Article 235 opens the door to injecting new areas of responsibility into the powers of the EC to an extent that does not respect the demand for specificity in section 20 of the Danish Constitution.<sup>11</sup>

The plaintiffs argued that the dynamic approach of the European Court of Justice (ECJ) has further increased the limitations on Danish sovereignty in a manner not covered by section 20 of the Danish Constitution and Denmark's Act of Accession to the Maastricht Treaty. Accordingly, the Community now contains the elements necessary for an independent legal system and control of legality. This argument implies that the Community has adopted, to a certain degree, the function and structure of a constitutional state characterized by constant expansion into new fields of responsibility.<sup>12</sup> The plaintiffs concluded that the precondition in section 20, that an international authority can be allowed neither to establish its own competence nor to set the limits of its power, was not (any longer) fulfilled.

In its decision—the longest in the recent history of Danish courts—the Supreme Court delimited the content of section 20 negatively, stating: “[S]ect. 20 does not permit that an international organisation is entrusted with the issuance of acts of law or the making of decisions that are contrary to provisions in the Constitution, including its rights of freedom. Indeed, the authorities of the Realm have themselves no such power.”<sup>13</sup> Furthermore, the wording of section 20(1) must be interpreted to mean that “a positive delimitation must be made of the powers delegated, *partly* as regards the fields of responsibility and *partly* as regards the nature of the powers. The delimitation must enable an assessment to be made of the extent of the delegation of sovereignty.”<sup>14</sup>

The Court noted that “[t]he powers delegated may be indicated by means of reference to a treaty”<sup>15</sup> and need not be described in detail in the statute itself. Observing that the requirement of specificity in section 20 of the Constitution prevents an international organization from defining its own powers, the Court concluded that the framework within which the Community works does not allow it to do so. The EC Treaty is based on the principle of conferred powers and the institutions of the European Community may act only within the limits provided by the Treaty. The Court accordingly observed: “The principle of conferred powers thus implies a restriction on the powers of the institutions which is in keeping with the demand for specification in sect. 20 of the Constitution. The Supreme Court finds that the specific rules of authority in the EC Treaty meet this demand.”<sup>16</sup> In this connection, the Court concluded that the wording of Article 235 is not too broad to satisfy the requirement of specificity. “[T]he fact that action by the

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within six months after its final passing be submitted to the Electors for approval or rejection by direct voting. Rules for this voting shall be laid down by Statute. If a majority of the persons taking part in the voting, and at least 40 percent of the Electorate, has voted in favor of the Bill as passed by the Parliament, and if the Bill receives Royal Assent, it shall form an integral part of the Constitution Act.

Unofficial translation by the Danish Ministry of Foreign Affairs.

<sup>10</sup> See also PAUL P. CRAIG & GRÁINNE DE BÚRCA, *EC LAW: TEXT, CASES, AND MATERIALS* 113–14 (2d ed. 1998).

<sup>11</sup> Plaintiffs referred to documents indicating that the Danish Government on several occasions had doubts about whether Article 235 could be used as the legal basis of EC law, but the Government had never acted on those doubts.

<sup>12</sup> 1998 UFR at H 861–62.

<sup>13</sup> *Id.* at H 869, para. 9.2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 1998 UFR at H 869, para. 9.3.

Community is considered necessary in order to attain one of the objectives of the Community does not in itself constitute sufficient background for applying the provision."<sup>17</sup> The action taken under Article 235 must fall within the scope of operation of the Common Market that appears from other provisions of the Treaty.<sup>18</sup>

Although recognizing that the Act of Accession implies that the power to review the validity and legality of EC acts is vested in the ECJ, the Supreme Court concluded that Danish courts

cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for the transfer of sovereignty made by the Act of Accession. Therefore, Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the transfer of sovereignty according to the Act of Accession. Similar interpretations apply with regard to community-law rules and legal principles which are based on the practice of the EC Court of Justice.<sup>19</sup>

Against this background, the Court decided that the powers transferred to the Community were not incompatible with the requirement of specificity in section 20(1). In its view, the delegation of powers is almost exclusively a matter of a political nature, and the wording of section 20 should be understood to mean that a transfer of powers to international organizations may take place provided that it does not compromise the status of Denmark as an independent state.<sup>20</sup>

The Court also decided that the delegation of powers to the Community does not violate the assumption in the Constitution of a democratic system of government.<sup>21</sup> It observed that any surrender of sovereignty to an international organization involves "a certain encroachment on the Danish democratic system of government" but concluded:

In so far as concerns the EC Treaty, legislative powers have been transferred primarily to the Council, in which the Danish Government—answering to the Parliament—can exercise its influence. It is reasonable to assume that the Parliament has been entrusted to consider whether participation by the Government in the EC cooperation should be conditional upon any additional democratic control.<sup>22</sup>

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Under the Maastricht Treaty, the European Community has the authority to issue regulations that are directly applicable in the member states.<sup>23</sup> In *Costa v. ENEL*,<sup>24</sup> the

<sup>17</sup> 1998 UfR at H 870, para. 9.4.

<sup>18</sup> According to the Court, this interpretation is in accordance with a note from the Danish Government of January 21, 1997, and Opinion 2/94 of March 28, 1996, of the European Court of Justice regarding the Accession of the Community to the European Human Rights Convention, 1996 ECR I-1759. See 1998 UfR at H 870, para. 9.4.

<sup>19</sup> 1998 UfR at H 871, para. 9.6. See also the "German Maastricht decision," Oct. 12, 1993, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 89, 155, translated in 33 ILM 38 (1994), and the case note on this decision by Georg Ress, 88 AJIL 539, 543 (1994).

<sup>20</sup> On the question of sovereignty in relation to the Danish Maastricht case, see Ole Spiermann, *Hvad kommer der tyve? En analyse af Højesteretsdommen i "Grundlovssagen,"* 1998 UfR B 325.

<sup>21</sup> On the EC Treaty and democracy in member states, see German Maastricht decision, note 19 *supra*.

<sup>22</sup> 1998 UfR at H 871, para. 9.9.

<sup>23</sup> See Maastricht Treaty, *supra* note 7, Art. 189 (249 according to new enumeration in the Treaty of Amsterdam, *supra* note 7, 37 ILM at 128).

<sup>24</sup> Case 6/64, *Costa v. ENEL*, 1963 ECR 1.

ECJ established the principle of the primacy of EC law over national law. The subsequent *Simmenthal* case<sup>25</sup> established that EC law also prevails over national constitutions.<sup>26</sup>

These attempts by the ECJ to break down the dualistic basis of the relationship between national legal systems and the EC legal system are problematic. From the point of view of a member state, it is its national constitution that provides the legal basis for joining the Community and accepting the principle of direct effect and primacy of EC law in the first place. If the national constitution places conditions on the transfer of legal authority to a supranational organization, it is possible to argue that those conditions have not been met. By doing so, one reasserts the dualistic character of the relationship between national and international law, for the argument rests on the presupposition that the national constitution is the original source from which all valid legal powers, including those vested in supranational organizations, flow.

According to the Maastricht Treaty,<sup>27</sup> the ECJ is the arbiter of questions on whether regulatory measures of the EC authorities are legally valid. But, from a national point of view, if this is accepted as definitive, national courts will be deprived of the possibility of enforcing constitutional limits on delegated powers. The Danish citizens who brought the case against the Danish Government believed that this problem of "compétence de la compétence" would strengthen the argument that the Treaty violates section 20 of the Danish Constitution.<sup>28</sup> If the ECJ is the final arbiter in settling the scope of the delegated powers, then the international organization itself specifies the powers delegated to it.

The Danish Supreme Court made clear that section 20 would be violated if the Community were to specify its own powers.<sup>29</sup> Thus, only on the assumption that the Danish courts, rather than the ECJ, would definitively determine the competence delegated to EC organs by Denmark did the Supreme Court rule that the Treaty did not violate the Danish Constitution. As with the German decision on this matter,<sup>30</sup> this holding was the most controversial part of the Danish decision.

The problem posed by this conclusion is that several courts regard themselves as supreme in relation to the same normative system. The ECJ, the German Constitutional Court and the Danish Supreme Court (and perhaps other national courts that follow suit)—all see themselves as the final arbiter of the validity of EC regulatory acts, each deriving its authority and its duties from a different constitutive instrument.<sup>31</sup> The ECJ is committed to ensuring its own independence and supremacy under the Treaty, and that of the other EC organs, in determining the latter's competence and its legal consequences. From the ECJ's point of view, the obligation of national courts to protect their national constitutions is subordinate to their obligation to respect Community law. At least the German and Danish courts disagree.

<sup>25</sup> Case 106/77, *Simmenthal*, 1978 ECR 629.

<sup>26</sup> Both *Simmenthal* and *Costa v. ENEL* of course presuppose the principle of direct effect, which was established by the ECJ in Case 26/62, *Van Gend en Loos*, 1963 ECR 1.

<sup>27</sup> See Articles 164 (now 220), 173 (now 230), and 177 (now 234) of the two versions, *supra* note 7.

<sup>28</sup> As the Court stated:

The appellants have pleaded that the jurisdiction of the EC Court of Justice under the Treaty, held against [i.e., together with] the principle of precedence for EC law, implies that Danish courts of law are prevented from enforcing the limits for the transfer of sovereignty which has taken place by the Act of Accession and that this must be taken into consideration when assessing if the demand for specification in sect. 20(1) of the Constitution has been observed.

See 1998 UfR at H 871, para. 9.6.

<sup>29</sup> See *id.* at H 869, para. 9.2.

<sup>30</sup> See Georg Ress's report on the German *Maastricht* decision, note 19 *supra*.

<sup>31</sup> Professor Frowein predicted this development. See Jochen Abr. Frowein, *Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit*, 54 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 15 (1994).

What happens now? In our opinion, two scenarios are possible.<sup>32</sup> Under the first scenario, the national courts will resist the ECJ's claim to supremacy, and the ECJ will resist the national courts' claim to supremacy. A growing mutual intolerance between the two may develop and lead to a situation in which national courts strike down European legislation perhaps as frequently as they do national legislation or national administrative decisions. The ECJ can do little to prevent this outcome, as the execution of European law takes place at the national level. Gradually, the European legal order will lose its credibility and disintegrate into an intergovernmental forum not much different from most international organizations.

The other scenario is one in which the national courts and the ECJ will grow to understand the reasons why the respective courts assert supremacy. In interpreting the Treaty, the ECJ will become more sensitive to national constitutional limits on delegations of power. For their part, the national courts will develop criteria that would allow Community law upheld by the ECJ to be reviewed by them only on rare occasions and only for very good reasons. The consequence could well be increased interaction between national courts and the ECJ in helping to shape the orderly development of the relationship between the European Community and the member states.

The second scenario seems more probable than the first. If we generalize the formulation of the Danish Supreme Court, European legislation will be struck down by national courts only in what can be described as an extraordinary situation characterized by the presence of the requisite certainty that the application of the Treaty lies beyond the surrender of sovereignty. In our view, allowing national courts to strike down European legislation in such a context might well enhance rather than restrain the development of a coherent European legal order by both the ECJ and national courts. One would be adhering to the principle enunciated in the German *Maastricht* decision that the interaction between the national courts and the ECJ must take the form of a cooperative relationship.<sup>33</sup>

The dream of European constitutionalists is broad acceptance of a common European *demos* as the basis for a supreme European constitutional order. Today such acceptance is prevalent among neither politicians nor the population, and we see no indication that this situation is about to change. If we are right, the European Community will continue to be seen largely as a regional organization whose authority and power in the end depend upon the member states. We are not suggesting that there can be no further development. But the best way to promote such development may be to lower the expectations for the "European project." A first step could be to fashion a common strategy for dealing with the adjudication of claims that legal acts issued by the Community are *ultra vires*.

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<sup>32</sup> The two scenarios we depict are not the extreme ones depicted by Phelan as revolt or revolution. See DARMUID ROSSA PHELAN, *REVOLT OR REVOLUTION: THE CONSTITUTIONAL BOUNDARIES OF THE EUROPEAN COMMUNITY* (1997). Rather, our account was inspired by Mattias Kumm's paper *Who Is the Final Arbiter of Constitutionality in Europe?* (1998), available at <[www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-10.html](http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-10.html)>. In this paper, Kumm describes what he calls the Cassandra scenario and the Pangloss scenario, see *id.* at 4-5.

<sup>33</sup> See BVerfGE 39, at 175, 88 AJIL at 544.

*Confiscation of property in Czechoslovakia in 1945—exclusion of German jurisdiction—Convention on the Settlement of Matters Arising out of the War and the Occupation—nationality in international law—neutrality of Liechtenstein in World War II*

PRINCE OF LIECHTENSTEIN v. FEDERAL SUPREME COURT. Case 2 BvR 1981/97. 36 Archiv des Völkerrechts 198 (1998).

German Federal Constitutional Court (3d Chamber, 2d Senate), January 28, 1998.

On January 28, 1998, a chamber of the German Constitutional Court decided that the Court would not deal with a constitutional complaint brought before it by Prince Hans-Adam II of Liechtenstein, Head of State of the Principality of Liechtenstein.<sup>1</sup> In effect, the chamber thus upheld the decisions made by the civil courts rejecting the Prince's attempt to recover a family painting confiscated by Czechoslovakia and currently on loan to a German museum.

The painting, *Scene around a Dutch Lime Kiln* by the Dutch painter Pieter van Laer (1599–1642), had belonged to the Liechtenstein collection at least since 1767. At the end of World War II, it was located in one of the family's estates in the present Czech Republic. It was confiscated without compensation by Czechoslovakia pursuant to a decree of the President of the Czech and Slovak Republic of June 21, 1945 (the so-called twelfth Beneš decree).<sup>2</sup> In 1991 the State Office for the Protection of Monuments of Brno in Czechoslovakia lent the painting, valued at five hundred thousand German marks, to the Wallraf Richartz Museum, a municipal museum in Cologne. Prince Hans-Adam, the heir of the last owner, his father Prince Franz Joseph II, obtained an interim injunction from the Higher District Court of Cologne on November 11, 1991, to have the painting sequestered, and asked the city of Cologne to consent to its surrender to him. He argued that the expropriation had violated the terms of the decree itself; but even if lawful under Czechoslovak law, such a measure was unlawful under international law or irrelevant to the proceedings of a German court because it contravened the *ordre public* of the Federal Republic.

The Higher District Court declared the lawsuit inadmissible.<sup>3</sup> It referred to the 1954 Überleitungsvertrag, or "Transition Treaty," between the United States, the United Kingdom and France, on the one hand, and the Federal Republic of Germany, on the other hand.<sup>4</sup> This was one of the so-called Paris Treaties that terminated the military occupation of West Germany. After the conclusion of the Treaty on the Final Settlement with respect to Germany in 1990,<sup>5</sup> but before the suspension of the four powers' rights and responsibilities relating to Berlin and to Germany as a whole,<sup>6</sup> the parties to the

<sup>1</sup> The complaint was brought in accordance with Article 93, paragraph 1 (4a) of the German Constitution (Basic Law). See GRUNDGESETZ [GG], translated in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1994). Section 93b of the Statute of the Constitutional Court, as amended in 1993, empowers chambers of three judges unanimously to decide that the Court will not adjudicate a constitutional complaint, provided that the complaint is not of fundamental importance or does not have a chance of succeeding. The chambers are free to give reasons for such a decision; in the present case, the chamber chose to do so. Gesetz über das Bundesverfassungsgericht (Bundesverfassungsgerichtsgesetz), Bundesgesetzblatt [BGBl.] I 1993, S.1474, 1485.

<sup>2</sup> Decree concerning the confiscation and speedy distribution of the agricultural property of Germans, Hungarians and traitors to and enemies of the Czech and Slovak people, 4 DOKUMENTATION DER VERTREIBUNG DER DEUTSCHEN AUS OST-MITTELEUROPA, pt. 1, at 225 (Bundesministeriums für Vertriebene, Flüchtlinge und Kriegsgeschädigte ed., 1957) (German trans.).

<sup>3</sup> Decision of Oct. 10, 1995, Case 5 O 182/92, 16 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 419 (1996). For a critical comment, see Ignaz Seidl-Hohenveldern, *Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als angeblich "deutsches" Eigentum*, id. at 410.

<sup>4</sup> Convention on the Settlement of Matters Arising out of the War and the Occupation, May 26, 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on Oct. 23, 1954), BGBl. II 1955, S.405, 440, 6 UST 441, TIAS No. 3425, 332 UNTS 219.

<sup>5</sup> Sept. 12, 1990, BGBl. II 1990, S.1318, reprinted in 29 ILM 1186 (1990).

<sup>6</sup> See Declaration of the Foreign Ministers of the French Republic, the Union of Soviet Socialist Republics, the United Kingdom and the United States, Oct. 1, 1990, BGBl. II 1990, S.1331, reprinted in 85 AJIL 175 (1991).

Transition Treaty expressly agreed that its relevant provisions were to remain in force.<sup>7</sup> Chapter 6, Article 3 of the Transition Treaty provides:

(1) The Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany.

....

(3) No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraphs 1 and 2 of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments.

The court held that paragraph 3, notwithstanding its wording, applies not only to persons who have acquired or transferred property, but also to an actual possessor like the city of Cologne whose title derives from a person who has acquired ownership in accordance with one of the measures described in paragraph 1. "Any examination of [such] measures by German courts should be excluded."<sup>8</sup> The court rejected the claimant's submission that it was only measures against German assets and property that could not be reviewed by a German court, and that his father had never been a German national. Referring to an early decision of the German Supreme Court,<sup>9</sup> the court stated that it was up to the expropriating state to decide whether it regarded the property in question as German or not. The purpose of the treaty provisions, the court said, was to give final sanction to the various seizures and confiscations carried out "in connection with World War II," and this purpose could be achieved only by precluding review by German courts of all seizures and expropriations made by foreign states in that historical context. For this reason, the plea that the measures contravened the German *ordre public* was also rejected by the court.<sup>10</sup> The court further observed that, although the expropriation of the claimant's father's property was part of a land reform, it had served one of the purposes set out in Chapter 6, Article 3(1) of the Transition Treaty because the measure was directed at enemy property.<sup>11</sup>

The court concluded that, irrespective of that Treaty, it is beyond the powers of a German court to examine whether a measure of expropriation was lawful under the law of the expropriating state. "It is exclusively for the Czechoslovak authorities to decide upon the interpretation and application of Czechoslovak law in the territory of former Czechoslovakia."<sup>12</sup> The court thus accepted a 1951 decision of the Administrative Court of Bratislava, ruling that the expropriation against the claimant's father had been legitimate because he was a "person of German ethnicity."

An appeal of this decision was dismissed as unfounded by the Court of Appeals of Cologne.<sup>13</sup> In the main, the appellate court reiterated and amplified what the lower court had said. In particular, it concluded that it was up to Czechoslovakia as a "third state favored by the Transition Treaty" to decide which assets and property it regarded as

<sup>7</sup> Exchange of notes of Sept. 27 and 28, 1990. See, in particular, paragraph 3 of the German note, BGBl. II 1990, SS.1386, 1387-88.

<sup>8</sup> Sec. I(2b)(aa) of the decision, *supra* note 3.

<sup>9</sup> Decision of Jan. 29, 1953, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 8, S.378, 383.

<sup>10</sup> See sec. I(2b)(bb) of the decision, *supra* note 3.

<sup>11</sup> See *id.*, subpara. (cc).

<sup>12</sup> *Id.*, subpara. (dd).

<sup>13</sup> Decision of July 9, 1996, Case 22 U 215/95, 42 RECHT IN OST UND WEST 242 (1998), 8 ZEITSCHRIFT FÜR VERMÖGENS- UND IMMOBILIENRECHT 213 (1998).



German.<sup>14</sup> It emphasized that the exclusion of German jurisdiction provided for by the Treaty did not mean that the respective foreign state acts were recognized as lawful by Germany.

On September 25, 1997, the German Supreme Court (Bundesgerichtshof) declined to grant leave to appeal because "the matter is not of general importance, and the appeal has no prospect of succeeding."<sup>15</sup> Thus, the decision of the court of appeals became final, except for the extraordinary remedy of a complaint to the Constitutional Court.<sup>16</sup>

In the present case, the Constitutional Court rejected the claimant's assertion that the decisions of the civil courts had violated three rules of general international law; namely, (1) that after a war the property of nationals of neutral states may not be confiscated by a victorious power; (2) that treaties may not impose obligations on third states without their consent; and (3) that the nationality of a natural person is determined exclusively by the law of the state that has conferred its nationality on that person. The Court said that these rules were irrelevant to the civil courts' decisions. They pertained to whether the Czechoslovak acts of expropriation were lawful or not, a question not commented on by the courts. The civil courts had not passed judgment on the nationality of the complainant's father. The provision of the Transition Treaty that bars certain actions before German courts is not a treaty obliging third states; "[it] only obliges Germany and its courts, not Liechtenstein."<sup>17</sup> Further, the Court held that the treaty provision does not violate the right to property guaranteed by Article 14 of the Basic Law because it relates to events that took place before the Basic Law entered into force on May 23, 1949. As to the complainant's assertion<sup>18</sup> that his general freedom of action was infringed because the 1990 exchange of notes<sup>19</sup> had not been consented to by the German Parliament, the Court held that no such consent was necessary because the exchange did not constitute a new international obligation of the Federal Republic with an impact on individual rights but only made clear that certain treaty obligations would remain in force.

On June 9, 1998, the Higher District Court of Cologne lifted its interim injunction of November 11, 1991, on the grounds that the application for the injunction had been inadmissible because German courts did not have jurisdiction over the matter.<sup>20</sup> In its view, the petitioner's announcement that he would seek justice "on a European level" did not justify confirming the injunction because the court was unable to assess the prospects of resort to a European institution. The Prince thereafter filed an application with the European Commission on Human Rights.

\* \* \* \*

These decisions of the civil courts are not tenable. First, good arguments support the view that the 1945 Beneš decrees do not belong among the measures defined in Chapter 6, Article 3(1) of the Transition Treaty because their purpose was neither reparation nor restitution, and they were not necessitated by the state of war between Germany and

<sup>14</sup> See *id.*, sec. I(2b) (aa). In addition to the decision of the German Supreme Court cited by the lower court, *supra* note 9, the appellate court referred to a later decision of the same court, that of April 11, 1960, BGHZ 32, 170.

<sup>15</sup> Bundesgerichtshof, Sept. 25, 1997, case II ZR 213/96.

<sup>16</sup> The Constitutional Court does not comprehensively review the decisions of lower courts. The complainant can claim violation, by an act of one of the branches of government, only of a fundamental right or freedom protected by the Basic Law. See GG, *supra* note 1, Art. 93, para. 1(4a).

<sup>17</sup> Case 2 BvR 1981/97, sec. II(1), last para.

<sup>18</sup> Under GG, *supra* note 1, Art. 2, para. 1.

<sup>19</sup> See *supra* note 7.

<sup>20</sup> Landgericht Köln, Case 5 O 388/91.

Czechoslovakia.<sup>21</sup> Second, and more important, there is no doubt that the word "German" in that provision refers to the nationality, and not the ethnicity, of the owner of the seized property.

To the Allied powers and the Federal Republic alike, "German external assets" were assets owned by German nationals and located outside the German borders of December 31, 1937. It is obvious that Germany, as the state burdened by the provision, should be able to establish whether its conditions were met. Nothing supports the view that the clause was meant to empower an expropriating state arbitrarily to determine who is a German and who is not. Czechoslovakia could not validly designate someone as a German national who not only did not possess German nationality, but also did not—in the words of the *Nottebohm* case—have any preponderant factual connection with Germany.<sup>22</sup>

The cited decisions of the German Supreme Court of 1951 and 1955<sup>23</sup> do not support the opposite view. The first dealt with whether the property of the Sudeten Germans was to be regarded as "German property" under Law No. 63 of the Allied High Commission. The Sudeten Germans were persons of German ethnicity living in the formerly Austrian Sudetenland, which became part of the newly founded Czech and Slovak Republic in 1919 and was annexed by Germany in 1938. The Court's reasoning was based on the fact that the Sudeten Germans had become German nationals in 1938 and that this nationality had been accepted by Czechoslovakia. The Court only additionally pointed out that in 1945 Czechoslovakia had treated the respective persons as Germans. In the second case, the issue was whether a particular object, seized by the United States in 1953 on the basis of the Trading with the Enemy Act, belonged to the foreign plaintiff or the German defendant. Confident that American courts would resolve the matter in a just way, the Court declined jurisdiction.

These considerations lead to the conclusion that the action of the Prince of Liechtenstein was wrongly declared inadmissible by the German courts. The father of the present Prince was never a German national, but a national (and head of state) of the Principality of Liechtenstein, a neutral state throughout World War II. Neither German law nor international law would have prevented the courts from establishing whether the Prince or the Czech State Office was the owner of the painting. By equating a foreign national with German nationals, the courts denied him legal protection, yet because he is a foreign national he cannot claim diplomatic protection by Germany against the expropriating state.

On the other hand, the Constitutional Court could hardly have reached a different conclusion than the one it did. Although the civil court decisions were incorrect, they did not violate any specific fundamental right or freedom of the Prince that is protected by the Basic Law. In particular, his case was heard by a "lawful judge" in accordance with Article 101 of the Basic Law. However, it is regrettable that the Constitutional Court gave the impression that the decisions of the civil courts could not be faulted.

It has been argued that an improper interpretation of the Transition Treaty that effectively burdens nationals of Liechtenstein with the same legal disadvantage as Germans constitutes a violation of the sovereignty of Liechtenstein and disregard for the Principality's neutral status in World War II, and thus engages Germany's international

<sup>21</sup> See Christian Tomuschat, *Die Vertreibung der Sudetendeutschen: Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und deutschem Recht*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 41–43, 55–57 (1996). See also Seidl-Hohenveldern, *supra* note 3, at 411.

<sup>22</sup> See *Nottebohm Case (Liechtenstein v. Guat.)*, Second Phase, 1955 ICJ REP. 4, 24 (Apr. 6).

<sup>23</sup> See *supra* notes 9 and 14.

legal responsibility.<sup>24</sup> This reasoning seems doubtful. General international law does not oblige a state to put its court system at the disposal of a foreigner who in effect seeks to enforce property rights against a third state.

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*NATO Status of Forces Agreement—primary right to exercise jurisdiction—offenses committed in performance of official duty—judicial review—of characterization of such offenses—double jeopardy*

PUBLIC PROSECUTOR v. ASHBY. Judgment No. 161/98.  
Court of Trento, Italy, July 13, 1998.

On February 3, 1998, a U.S. Marine EA-6B aircraft, redeployed at Aviano air base as part of Operation Deliberate Guard in support of the multinational Stabilization Force (SFOR) in Bosnia,<sup>1</sup> was on a low-level training mission over northern Italy when it severed the wires of the cable car at the Cermis ski resort near Cavalese, causing the deaths of twenty people.<sup>2</sup> Because the exercise of criminal action is mandatory under Article 112 of the Italian Constitution,<sup>3</sup> the public prosecutor decided that he had to institute preliminary investigations immediately, with a view to determining whether to prosecute. On July 13, 1998, an Italian judge, in a preliminary hearing, rejected the prosecutor's request that seven U.S. servicemen stand trial for the cable-car accident.<sup>4</sup> The judge found that, under Article VII, paragraph 3(a) (ii) of the NATO Status of Forces Agreement (NATO SOFA),<sup>5</sup> the United States, as the sending state, had the primary right to exercise jurisdiction over the case and that jurisdiction had not been waived.<sup>6</sup> Accordingly, the judge dismissed the case.<sup>7</sup>

<sup>24</sup> See Hermann Weber, *Anmerkung zur "Liechtenstein-Entscheidung" des Bundesverfassungsgerichts vom 28. Januar 1998*, 36 ARCHIV DES VÖLKERRECHTS 188, 192-93 (1998).

<sup>1</sup> See UN Security Council Resolution 1088 (1996) of December 12, 1996, on the situation in Bosnia and Herzegovina, authorizing

the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement [NATO] to establish for a planned period of 18 months a multinational stabilization force (SFOR) as the legal successor to IFOR under unified command and control in order to fulfil the role specified in Annex 1-A and Annex 2 of the Peace Agreement. (Para. 18)

It further authorized "the Member States to take all necessary measures, at the request of SFOR, either in defence of SFOR or to assist the force in carrying out its mission" (para. 20). The U.S.-led SFOR mission was approved on December 17, 1996, by the NATO Defense Ministers. On December 21, 1996, air force units previously associated with Operation Decisive Endeavor in support of IFOR were transferred to Operation Deliberate Guard in support of SFOR.

<sup>2</sup> The victims were eight Germans, five Belgians, three Italians, two Poles, one Dutch woman and one Austrian man.

<sup>3</sup> Article 112 reads: "The Public Prosecutor is responsible for instituting penal proceedings." CONST. Art. 112, translated in 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1987).

<sup>4</sup> Under Article 20 of the Italian Code of Criminal Procedure, jurisdictional questions may be raised at any stage or phase of the proceedings by the courts on their own motion.

<sup>5</sup> Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, June 19, 1951, 4 UST 1792, 199 UNTS 67, 48 AJIL Supp. 83 (1954).

<sup>6</sup> The Italian Government had requested a waiver of jurisdiction both for the seriousness of the incident, which had sparked a public outcry, and for the opportunity to make a complete assessment of responsibilities in a single trial, should Italian nationals also be charged with responsibility for the accident. According to Article VII, paragraph 3(c), of the NATO SOFA, however, the state with the primary right to exercise jurisdiction must give "sympathetic consideration" to a request for a waiver in cases where the other state considers the waiver to be of "particular importance." The United States declined to waive its jurisdiction.

<sup>7</sup> The Trento judge's decision was subject to appeal to the Court of Cassation, but no appeal was taken within the requisite time.

Both to investigate the accident and to cooperate with Italian prosecutors in the town of Trento,<sup>8</sup> a board of six U.S. Marine Corps officers, one U.S. Air Force officer and one Italian Air Force officer had been convened at Aviano the day following the accident. On March 3, the board released its findings. According to the board:

The cause of the mishap was *aircrew error*. The aircrew aggressively maneuvered their aircraft, exceeded the maximum airspeed and flew well below 1000 feet. . . .

The actual low altitude restriction in the mishap area was 2000 feet. Several documents in the Squadron area indicated that there was such a restriction . . . . However, 15 of the 18 aircrew members in [Squadron] VMAQ-2 . . . were unaware of any 2000 foot low level restriction in the area. This was a result of *supervisory error*. However, this inattention . . . did not cause the mishap.<sup>9</sup>

The board recommended that the four crew members<sup>10</sup> be referred to a pretrial investigation under Article 32 of the U.S. Uniform Code of Military Justice (U.C.M.J.) to determine whether they should face court-martial. Disciplinary action was recommended for their supervisors. Lieutenant General Peter Pace, Commander of Marine Forces in the Atlantic Region, agreed with both the findings and the recommendations of the board.

On May 27, 1998, the Italian prosecutor filed a request for trial<sup>11</sup> of the four crew members and three supervisory officers<sup>12</sup> on charges of manslaughter and negligent endangerment of the safety of public transport.<sup>13</sup> Subsequently, the U.S. military judge and hearing officer recommended that the pilot and navigator be court-martialed,<sup>14</sup> but that no charges be brought against the other two crew members who had manned the rear seats.<sup>15</sup>

The Italian judge initially observed that the NATO Status of Forces Agreement, which was implemented in Italy by statute,<sup>16</sup> resolves all matters of jurisdiction concerning offenses that are committed by members of foreign military forces based in the territory of an allied state. The judge stated:

<sup>8</sup> Article VII, paragraph 6 of the NATO SOFA, *supra* note 5, requires that the authorities of the receiving and the sending states assist each other in investigations and the production of evidence.

<sup>9</sup> Emphasis in original. The board's findings were annexed to the prosecutor's request for committal to trial. The board's findings were summarized in N.Y. TIMES, Mar. 12, 1998, at A1.

<sup>10</sup> Capt. Richard Ashby, the plane's pilot, Capt. Joseph P. Schweitzer, the navigator, and Capt. Chandler Seagraves and William Raney, who manned the aircraft's rear seats.

<sup>11</sup> Request for committal to trial to the Judge of the preliminary hearing of the Court of Trento, No. 113/98 (May 27, 1998) (unpub.). This request followed the findings and recommendations of the Italian and U.S. joint investigation board but preceded the results of "Article 32 hearings" on whether or not to court-martial the four crew members. Italian criminal procedure sets a time limit of six months for the "preliminary investigation" phase (and provides for an extension if the investigators' needs so require). Thus, the prosecutor could well have postponed the request until after the U.S. military hearings, which were already scheduled for the months of June and July.

<sup>12</sup> The VMAQ-2 Squadron's commanding officer, Lt. Col. Richard A. Muegge, and the commanding officers of the 31st Fighter Wing stationed at Aviano air base, Timothy Peppe and Marc Rogers.

<sup>13</sup> Both charges were filed with aggravating circumstances: manslaughter causing the "death of more than one person," and endangering the safety of public transport "followed by disaster," under Article 589, paragraphs 1 and 3 (Count a), and Articles 432, paragraphs 1 and 3, and 499 (Count b) of the Italian Criminal Code, respectively.

<sup>14</sup> The pilot, Capt. Ashby, faces charges of involuntary manslaughter, negligent homicide, damage to military property, damage to private property and dereliction of duty; the navigator, Capt. Schweitzer, faces charges of negligent homicide, damage to military property, and dereliction of duty. After a new "Article 32" hearing, additional charges were brought against them of obstruction of justice and conspiracy to obstruct justice by removing a tape from the cockpit and attempting to stop the investigation by hiding or destroying evidence. Courts-martial were scheduled for December 7, 1998, and January 4, 1998, respectively.

<sup>15</sup> The latter's attorneys had argued that they had limited visibility from the rear cockpit and had no control over where the plane flew. Lt. Gen. Pace agreed with that recommendation.

<sup>16</sup> Law No. 1335 of Nov. 30, 1955, Gazz. uff., Jan. 10, 1956, No. 7.

Exclusive jurisdiction of one of the two States (the receiving State or the sending State) is provided for with respect to offenses that are punishable by the law of one State but not by the law of the other, in particular offenses related to the security of that State (article VII, paragraph 2). In all other cases, where the right to exercise jurisdiction is concurrent—that is with respect to offenses that are punishable by the law of both States—priority goes to the sending State in the case of offenses solely against the interests of that State (paragraph 3(a)(i)) or those committed in the performance of official duty (paragraph 3(a)(ii)); for any other offense, outside the performance of official duty, primary jurisdiction is vested in the receiving State (paragraph 3(b)).

The judge expressly characterized Article VII, paragraph 3(a)(ii) of the NATO SOFA as an exception to the general principle of the Italian state's jurisdiction over crimes committed on Italian territory (Article 6 of the Criminal Code). However, this exception should not be taken as an act of abdication of sovereignty on the part of the territorial state.<sup>17</sup>

The prosecutor had argued that flight EASY 01 of February 3, 1998, was a U.S. national mission because, although a low-level training mission within Operation Deliberate Guard, it did not come within the purview of existing treaties and subsequent technical agreements.<sup>18</sup> Article VII of the NATO SOFA, as a norm of a "special and exceptional" character, was to be interpreted and applied narrowly, in close connection with the North Atlantic Treaty of April 4, 1949 (with particular reference to Article 3, which sets out the purpose of NATO). Therefore, according to the prosecutor, Article VII could not apply to foreign forces in the territory of a state of the alliance when those forces had not performed functions that are specifically provided for under any of the existing agreements. Following such a restrictive approach, the prosecutor argued that the NATO SOFA was inapplicable.

The judge rejected the prosecutor's argument, noting that the plain text of Article VII states that it is intended to apply to all members of allied armed forces stationed on the territory of the state, with no exception whatsoever with respect to any official activities that they may carry out. According to the judge, the distinction between training missions within NATO and missions that are not connected with the North Atlantic Treaty has no bearing on the application of the NATO SOFA.

In determining whether the offenses in question arose out of "acts or omissions done in the performance of official duty" within the meaning of paragraph 3(b)(ii) of Article VII of the NATO SOFA, the judge found that it was a "self-evident and well-established fact" that flight EASY 01 had taken place in the course of a training mission and therefore in the performance of duty. The judge said that he could not accept the prosecutor's argument that the infringement of altitude restrictions under both Marine Corps rules and Italian regulations implied a breach of the link between the offenses and the

<sup>17</sup> The NATO SOFA was held to be restating the well-established principle of customary international law of the "law of the flag." The status of forces abroad in the absence of a treaty providing for the exercise of criminal jurisdiction was discussed by SERGE LAZAREFF, *STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW* 11–18 (1971). For a thorough analysis of state practice before World War II, see G. P. Barton, *Foreign Armed Forces: Immunity from Criminal Jurisdiction*, 27 BRIT. Y.B. INT'L L. 186 (1950); and G. P. Barton, *Foreign Armed Forces: Qualified Jurisdictional Immunity*, 31 BRIT. Y.B. INT'L L. 341 (1954). See also D. S. Wijewardane, *Criminal Jurisdiction over Visiting Forces with Special Reference to International Forces*, 41 BRIT. Y.B. INT'L L. 122, 141, 146, 194 (1965–66), (holding that Article VII, far from being a "radically new system," is a coherent statement of the principles and practices that had already emerged in international law). The view that no general rule of international law supports foreign forces' immunity for actions taken in their official capacity was recently advanced by PASQUALE DE SENA, *DIRITTO INTERNAZIONALE E IMMUNITÀ FUNZIONALE DEGLI ORGANI STATALI* 244–50 (1996).

<sup>18</sup> Agreements referred to included the Bilateral Infrastructure Agreement (BIA) of October 20, 1954; the Memorandum of Understanding (MOU) on the use of the Aviano air base of November 30, 1993; and the Shell Agreement of February 2, 1995, between the Italian Minister of Defense and the U.S. Department of Defense. Because of their nature as "classified information," the content of these agreements was known to the prosecutor but could not be revealed. "Declassification" had been requested but not yet granted.

performance of duty. The judge found that there was no doubt that the violation of attitude regulations had been made in a training flight and an offense therefore committed in the performance of duty.

The judge noted that the request by the Italian Government for a waiver of jurisdiction clearly implied that Italy had acknowledged that primary jurisdiction rested with the United States, and had done so on the necessary premise of the performance of official duty. However, the Government's position was not taken as decisive: "A norm expressly preventing judicial review on questions of jurisdiction is to be found in Italian law only in the case of priority of Italian jurisdiction, with respect to waivers of jurisdiction under Article 1 of Presidential Decree No. 1666 of 1956."<sup>19</sup> Otherwise, in the absence of any provision to the contrary, courts have the power and duty to apply the jurisdictional provisions of the NATO SOFA directly.<sup>20</sup> While the courts should take their Government's position into account, the Italian Government's determination regarding official duty was not binding on the courts, but merely ruled out the existence of any "differences between the Contracting Parties relating to the interpretation or application of this Agreement" to be settled through negotiations under Article XVI of the NATO SOFA.

Similarly, no binding effect was accorded the statement by the U.S. military command on this issue. A note of the Italian Justice Department of March 25, 1957, granting the military authorities of the sending state the final determination of what is to be considered an official duty was held not to be binding on the courts.<sup>21</sup>

The prosecutor had also argued that Article VII, paragraph 3(a)(ii) of the NATO SOFA implied that the interests of the sending state and the receiving state had to be balanced, with the effect that the sending state has primary jurisdiction only in relation to "offenses not seriously affecting the community of the receiving State or infringing mainly upon the interests of that State." The judge concluded that, while the criterion of preponderance of affected interests underlies the rule on priority of jurisdiction of the sending state set out in paragraph 3(a)(i) (for "offenses solely against the property or security of that State"), the same rationale does not apply to paragraph 3(a)(ii), which leaves no grounds for the suggested balancing test.

The prosecutor had advanced the proposition that the exclusive jurisdiction of Italian courts should be upheld at least for the offense of negligently endangering the safety of public transport under Article 432 of the Italian Criminal Code, as this offense is not punishable under the law of the United States; prosecution would not have been barred under the *ne bis in idem* principle of Article VII, paragraph 8, which applies only when an

<sup>19</sup> Presidential Decree of Dec. 2, 1956, No. 1666, Gazz. Uff., Mar. 16, 1957, No. 70. Article 1 states that the Executive may waive jurisdiction under the NATO SOFA; courts verify only that the waiver is "admissible and valid."

<sup>20</sup> Article 101, clause 2 of the Italian Constitution, *supra* note 3, reads: "The judges are subject only to the laws."

<sup>21</sup> Whether an offense is "done in the performance of official duty" and who decides this question is one of the major legal problems arising under the NATO SOFA. For the view that "[t]o make the commanding officer or to make the courts of the receiving State the final arbiter of this question seem to be equally objectionable alternatives," see R. R. Baxter, *Criminal Jurisdiction in the NATO Status of Forces Agreement*, 7 INT'L & COMP. L.Q. 72, 79 (1958). For the proposition that the military authorities of the state of origin are the proper authority to make this determination, based on the *travaux préparatoires* of the NATO SOFA and subsequent practice, see JOSEPH M. SNEE & A. KENNETH PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION 46-54 (1957); and LAZAREFF, *supra* note 17, at 170-93. On Italian courts' practice, see Vassalli di Dachenhausen, *L'art. VII della Convenzione di Londra sulle forze militari NATO e il giudice penale italiano*, 26 COMUNICAZIONI E STUDI 487, 512-25 (1980). The U.S. position that "determinations of duty status by the sending state are similar to statements of status issued by the Department of State which conclusively declare who is entitled to diplomatic status" is reported in Joseph H. Rouse & Gordon B. Baldwin, *The Exercise of Criminal Jurisdiction under the NATO Status of Forces Agreement*, 51 AJIL 29, 41 (1957).

accused person is tried for "the same offense."<sup>22</sup> Noting that the NATO SOFA is designed to avoid jurisdictional conflicts between the sending and the receiving states, the judge said that the concurrent jurisdiction presupposes that an act or omission is punishable as an offense under the law of both states, irrespective of the provisions under which the offense is prosecuted or the specific interests that are intended to be protected. Taking somebody's life is a criminal offense in both Italy and the United States. The fact that under Italian law the same act infringes two distinct criminal provisions and that the offense of "endangering the safety of public transport" finds no parallel in U.S. federal criminal law has no bearing on the application of the NATO SOFA. In this respect, the judge recalled that treaties should be interpreted in good faith. Had the negotiators of the NATO SOFA intended to give any relevance to the special categories of crimes that are provided for under the different criminal laws, they would have done so. Accordingly, not only does the United States enjoy the primary right to exercise jurisdiction in this case, but a subsequent trial in Italy would amount to a second trial for the same offense and be barred under the double-jeopardy provision of Article VII, paragraph 8.

Finally, the judge advanced the hypothesis, "which seems to occur in the present case," that United States authorities may decide not to bring a criminal action against some of those accused in the Italian proceedings. Even in that case, according to the judge, Italian courts would not acquire their right to exercise jurisdiction, "for the very obvious reason that even a dismissal of the case constitutes a form of exercise of jurisdiction on the part of the United States."

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The judge correctly concluded that Italy lacks jurisdiction and that a determination not to court-martial someone made pursuant to the formal procedure provided for in Article 32 of the U.C.M.J. represents an exercise of American jurisdiction and bars a subsequent trial by Italian courts.<sup>23</sup> However, with respect to the latter issue, the judge failed to distinguish the position of the four crew members from that of the three supervisory officers whose indictment was sought by the prosecutor.

The joint investigation board had recommended disciplinary action against the aircrew's supervisors. When the sending state's action is limited to disciplinary measures, there is reason to doubt whether the receiving state is barred from exercising its subordinate right to prosecute. It is even more doubtful that a bar to subsequent trial arises from a decision not to prosecute that has been reached after only an informal

<sup>22</sup> Article VII, paragraph 8 of the NATO SOFA, *supra* note 5, reads:

Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the same territory by the authorities of another Contracting Party.

<sup>23</sup> Article 32 hearings are the military equivalent of grand jury proceedings and therefore constitute per se a form of exercise of jurisdiction, whatever their outcome. See SNEE & PYE, *supra* note 21, at 71. These authors discuss what type of action by the United States constituted an exercise of jurisdiction in the *Whitley* case and express doubts that even the formal procedure provided for in Article 32 of the Uniform Code of Military Justice could represent an exercise of American jurisdiction and subsequently bar a trial in the receiving state. In *Aitchison v. Whitley*, Trib. correctionnel de Corbeil, Apr. 5, 1954, reported in 43 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 602 (1954), the issue was whether France, despite having waived its primary right to proceed, could regain its jurisdiction over the case once the United States decided not to try the accused. As was noted by SNEE & PYE, *supra*, at 70, the question is very similar to the problem arising when a state has the primary right to exercise concurrent jurisdiction under Article VII, paragraph 3(a): "The only difference would appear to be that in the latter instance the primary right is vested in the sending State from the date of the offense, while in the former situation the sending State obtains the right to proceed only after a waiver has been granted by the receiving State."

investigation.<sup>24</sup> Even if such a disposition of the case were considered a form of judicial action, it would be difficult to maintain that it is equivalent to a "trial" for purposes of the double-jeopardy provision of Article VII(8). Otherwise, there would be little difference between a primary right to exercise jurisdiction and exclusive jurisdiction.<sup>25</sup> Thus, there were certainly grounds for asserting that Italian courts have jurisdiction in the proceedings against the supervisory officers. The judge's ruling that there was no jurisdiction at all should at least have been more completely reasoned in this respect.<sup>26</sup>

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*NAFTA—North American Agreement on Labor Cooperation—freedom of association*

PUBLIC REPORT OF REVIEW OF NAO SUBMISSION NO. 9703.

U.S. National Administrative Office, U.S. Department of Labor, July 31, 1998.

On July 31, 1998, the U.S. National Administrative Office (NAO) issued its *Public Report of Review (Report)* on a petition filed by several U.S. and Canadian labor unions alleging labor law violations in Mexico. The *Report* found credible allegations that Mexican workers were threatened and attacked as they sought to pursue legitimate union activities at an export-processing plant in Ciudad de los Reyes, Mexico. In addition, the *Report* determined that Mexican officials had failed to protect the labor interests of Mexican workers seeking to exercise their freedom of association. The *Report* called for ministerial consultations between the U.S. Secretary of Labor and the Secretary of Labor and Social Welfare of Mexico to address these issues.

As part of the North American Free Trade Agreement (NAFTA), Canada, Mexico and the United States established the North American Agreement on Labor Cooperation (NAALC) to address labor law issues in the member states.<sup>1</sup> While the NAALC requires member states to promote compliance with their domestic labor laws, it does not establish a uniform set of labor standards. Rather, the NAALC requires member states to promote certain labor standards, subject to each state's existing domestic labor laws.<sup>2</sup> In addition, each state must ensure that all persons have appropriate access to legal institutions for the enforcement of that state's labor laws.

Under the NAALC, a review process was established to examine claims involving compliance by the member states with their national labor laws. A Commission for Labor Cooperation was created to oversee the overall implementation of the NAALC. In addition, a National Administrative Office was established in each member state to

<sup>24</sup> On August 9, Lt. Gen. Pace called for additional hearings regarding four squadron supervisors on the charge of dereliction of duty: the commanding officer, Lt. Col. Muegge; the executive officer, Lt. Col. John G. Keran III; the Director of Standardization and Safety, Maj. Max A. Caramanian; and Operator Officer Maj. Kirk S. Shawhan. After a military probe into whether they should be disciplined for dereliction of duty, Lt. Col. Muegge was relieved of his duties, reprimanded and reassigned, and Maj. Caramanian received a letter of reprimand. Apparently, no action was taken against commanding officers Rogers and Peppe, who were among the accused in the Italian proceedings.

<sup>25</sup> See *supra* note 23.

<sup>26</sup> Proceedings are still pending in Italy against a U.S. serviceman (Thayer Brian Mahoney) on the charge of having given false statements to the public prosecutor during the preliminary investigation. See Annalisa Ciampi, *Quale Sorte per i procedimenti della magistratura italiana rispetto alla strage della funivia del Cermis?* 81 RIVISTA DI DIRITTO INTERNAZIONALE 475, 478 (1998).

<sup>1</sup> North American Agreement on Labor Cooperation, Sept. 13, 1993, reprinted in 32 ILM 1499 (1993).

<sup>2</sup> Member states agreed to promote the following labor principles: freedom of association and the right to organize, the right to bargain collectively, the right to strike, prohibition of forced labor, labor protections for children and young persons, minimum employment standards, the elimination of employment discrimination, equal pay for women and men, the prevention of occupational disease and injury, compensation in the event of worker-related illness or injury, and the protection of migrant workers. *Id.*, Annex I.



accept public communications on labor law matters arising in the territory of another member state. Each NAO is authorized to investigate claims alleging violations of national labor laws. If violations are found, the NAO may request ministerial consultations between member states. Sanctions for noncompliance are available only in the event of persistent failure to enforce norms pertaining to occupational health and safety, child labor, or minimum wage standards. To date, nineteen submissions have been received by the respective NAOs under the NAALC alleging labor law violations in member states.<sup>3</sup>

NAO Submission No. 9703 was filed on December 15, 1997, by a group of U.S. and Canadian labor unions alleging freedom of association and worker health and safety violations at an ITAPSA export-processing plant in Ciudad de los Reyes.<sup>4</sup> The submission alleged that Mexican authorities had failed to guarantee the right of workers to organize an independent union at the plant.<sup>5</sup> It alleged that the drive to organize this independent union had been marred by physical violence and intimidation, including acts of rape and job loss; the retaliatory discharge of approximately fifty workers; the use of numerous armed thugs to intimidate voters during the election; the beating of an independent union representative during the election; and interference with the process of voting.<sup>6</sup> In addition, the submission alleged that Mexican authorities had failed to enforce laws designed to protect employees from dangerous health and safety conditions, including exposure to toxic substances. Finally, the submission alleged that a Federal Conciliation and Arbitration Board had failed to provide adequate and impartial administrative overview of these incidents.

Mexico's obligations to protect freedom of association and worker health and safety are found in the Mexican Constitution and the Federal Labor Law. Mexico is also party to several treaties that impose similar obligations, including ILO Convention No. 87 on the Freedom of Association and Protection of the Right to Organization, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.<sup>7</sup> The Federal Labor Law directly incorporates treaties into Mexican law.<sup>8</sup>

In response to the submission, the U.S. NAO conducted a review that included submissions from several groups, as well as the Mexican Government.<sup>9</sup> It also conducted public hearings.

On July 31, 1998, the NAO issued its *Public Report of Review*. First, the NAO determined that freedom of association, as set forth in the Mexican Constitution and the Federal Labor Law, had not been provided to Mexican workers at the ITAPSA plant. Second, it found that the proceedings initiated by the Federal Conciliation and Arbitration Board were inconsistent with the Federal Labor Law. Third, the NAO determined that the physical attacks on workers engaged in legitimate organizing activities raised trouble-

<sup>3</sup> Each NAO has received petitions for review. The U.S. NAO has received 12 petitions, the Mexican NAO 5, and the Canadian NAO 2. Of these, 12 petitions allege violations in Mexico, 6 allege violations in the United States, and 1 alleges violations in Canada. In one case, the Canadian and Mexican NAOs are both considering submissions concerning the same alleged violations in the United States.

<sup>4</sup> In addition, several U.S. and Mexican human rights groups and nongovernmental organizations were identified as concerned parties in the submission.

<sup>5</sup> The ITAPSA plant is operated by a subsidiary of Echlin Inc., a U.S. corporation with headquarters in Branford, Connecticut.

<sup>6</sup> Public Communication on Labor Law Matters Arising in Mexico: Election Contest Between Government and Independent Union 1-2 (Dec. 15, 1997).

<sup>7</sup> Under Mexican law, a treaty that has been approved by the Senate and officially published is binding at the national level. CONST. Art. 133; Ley sobre la Celebración de Tratados, D.O., 2 de enero de 1992, Art. 4.

<sup>8</sup> Ley Federal del Trabajo, D.O., 1 de abril de 1970, Art. 6.

<sup>9</sup> The U.S. NAO requested information from the Mexican NAO on Mexican law and practice on freedom of association and worker health and safety.

some questions. Finally, it found that health and safety inspections conducted at the plant appeared to conform to Mexican law, although questions were raised regarding the efficacy of these inspections.

The NAO recommended that the U.S. Secretary of Labor initiate ministerial-level consultations with the Mexican Secretary of Labor and Social Welfare, and that these consultations address three issues: (1) the freedom of association afforded Mexican workers in the conduct of an organization campaign and representation election; (2) the application of union security clauses in the context of freedom of association; and (3) the safety and health conditions prevailing at the plant, the efficacy of inspections, and the effectiveness of the efforts by Mexico to improve compliance with its safety and health laws.<sup>10</sup>

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The North American Agreement on Labor Cooperation constitutes an interesting example of transnational relations in the modern era and can provide a guide to similar agreements. First, rather than creating extensive international norms, it seeks to ensure that member states enforce their own labor laws. Second, rather than relying solely on an international review body, it authorizes member states to review compliance by other member states. What otherwise might be viewed as unacceptable interference by one state in the sovereign affairs of another becomes an accepted and expected review process. Third, the NAALC process recognizes the integral role of nonstate actors in promoting member states' compliance with national labor laws. Nonstate actors may initiate the NAALC process through NAO submissions. Moreover, the acts or omissions of nonstate actors may well form the basis for allegations of noncompliance with national labor laws.

While the NAALC process lacks traditional enforcement mechanisms, it can promote compliance by increasing the transparency of state behavior, monitoring state behavior, and ruling publicly on the lawfulness of state behavior. Nonstate actors are affected the most by noncompliance and will be motivated to challenge violations of domestic labor laws. Transparency and monitoring are facilitated by allowing these nonstate actors to submit petitions for review. The presence of NAOs in each member state, combined with their investigatory powers, strengthens the monitoring process. By publicizing rulings on compliance or noncompliance, the NAALC ensures that such behavior does not go unnoticed. NAO findings of noncompliance can lead to national and international action, as evidenced in this case. Accordingly, the NAALC can play an important role in promoting and protecting labor rights in member states even in the absence of binding enforcement mechanisms.

Recently, a four-year review of the NAALC process was completed by the Council of Ministers of the Commission for Labor Cooperation. While the council acknowledged that significant advances had been made, it determined "that there remains much more yet to be gained in achieving the objectives of the NAALC by more substantive and increased international cooperation."<sup>11</sup> In the final analysis, the success of the NAALC model can only be measured by its impact on labor rights in the member states. It is still too early to make this determination.

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<sup>10</sup> U.S. NAO, Public Report of Review of NAO Submission No. 9703 at 70-71 (1998).

<sup>11</sup> NAALC Council of Ministers, Review of the NAALC: Conclusions of the Council 3 (1998).

## CURRENT DEVELOPMENTS

### THE EU-U.S. COMPROMISE ON THE HELMS-BURTON AND D'AMATO ACTS

#### I. INTRODUCTION

In 1996, the United States Congress adopted two pieces of by now infamous and highly controversial legislation. The first was the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, better known as the Helms-Burton Act.<sup>1</sup> The second was the Iran-Libya Sanctions Act of 1996, also known as the D'Amato-Kennedy, or simply as the D'Amato, Act.<sup>2</sup> Both laws were adopted to further U.S. foreign policy by isolating the targeted countries through the imposition of severe penalties upon certain persons and companies investing in these countries. These Acts attracted considerable academic attention to the numerous problems they pose from an international law perspective. Arguments often focused on the fact that the laws had extraterritorial effect,<sup>3</sup> imposed secondary boycotts,<sup>4</sup> violated the principle of sovereignty and nonintervention in domestic matters,<sup>5</sup> and infringed rules recognized by international economic organizations such as the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO),<sup>6</sup> as well as the charters of international financial institutions.<sup>7</sup> The effects of these Acts on businesses in the European Union (EU) and Canada led to very vocal protests by both the business community and the governments concerned. Diplomatic efforts to resolve the controversy did not seem to bring the desired

<sup>1</sup> Pub. L. No. 104-114, 110 Stat. 785 (1996), *reprinted in* 35 ILM 357 (1996) [hereinafter Helms-Burton Act]. This Act attempts to stiffen sanctions against Cuba arising out of its expropriations and its form of government.

<sup>2</sup> Pub. L. No. 104-172, 110 Stat. 1541 (1996), *reprinted in* 35 ILM at 1273 [hereinafter D'Amato Act]. The Act is also known under the acronym ILSA. This Act attempts to impose sanctions on Iran and Libya for their actions in support of international terrorism and their efforts to develop weapons of mass destruction.

<sup>3</sup> See, e.g., René Lefebvre, *Frontiers of International Law: Counteracting the Exercise of Extraterritorial Jurisdiction*, 10 LEIDEN J. INT'L L. 1 (1997); Peter Glossop & Kelly Harbridge, *International Law and the Private Right of Action in Helms-Burton*, in CANADIAN COUNCIL ON INTERNATIONAL LAW: FOSTERING COMPLIANCE IN INTERNATIONAL LAW? 148, 165-68 (Proceedings of the 25th Annual Conference, 1996); H. Scott Fairley, *Exceeding the Limits of Territorial Bounds: The Helms-Burton Act*, 34 CAN. Y.B. INT'L L. 161, 189-95 (1996); Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AJIL 419, 430-32 (1996); Rupinder Hans, *The United States' Economic Embargo of Cuba: International Implications of the Cuban Liberty and Democratic Solidarity Act of 1995*, 5 J. INT'L L. & PRAC. 327, 340-44 (1996); Jonathan R. Ratchik, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U.J. INT'L L. & POL'Y 343, 362-64 (1996); Luisette Gierbolini, *The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum*, 6 J. TRANSNAT'L L. & POL'Y 289, 301-04 (1997); Anthony M. Solis, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19 LOY. L.A. INT'L & COMP. L.J. 709, 736-38 (1997).

<sup>4</sup> See Lowenfeld, *supra* note 3, at 429-30; Gierbolini, *supra* note 3, at 304.

<sup>5</sup> See Brigitte Stern, *Vers la Mondialisation juridique? Les lois Helms-Burton et D'Amato-Kennedy*, 100 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 979, 998-99 (1996); Glossop & Harbridge, *supra* note 3, at 162-65; Fairley, *supra* note 3, at 183-88; Gierbolini, *supra* note 3, at 300-01.

<sup>6</sup> See, e.g., Kees Jan Kuilwijk, *Castro's Cuba and the Helms-Burton Act—An Interpretation of the GATT Security Exception*, 31 J. WORLD TRADE 49 (1997); R. Dattu & J. Boscardiol, *GATT Article XXI, Helms-Burton and the continuing abuse of the national security exception*, 28 CAN. BUS. L.J. 199 (1997); Dean Bucci, *The Cuban Liberty and Democratic Solidarity Act of 1996—Implications for NAFTA*, 26 GA. J. INT'L & COMP. L. 409 (1996); Antonella Troia, *The Helms-Burton Controversy: An Examination of Arguments that the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 violates U.S. Obligations under NAFTA*, 23 BROOK. J. INT'L L. 603 (1997); Brian J. Welke, *GATT and NAFTA v. The Helms-Burton Act: Has the United States Violated Multilateral Agreements?* 4 TULSA J. COMP. & INT'L L. 361 (1997); Olivia Q. Swaak-Goldman, *Who Defines Members' Security Interest in the WTO?* 9 LEIDEN J. INT'L L. 361 (1996); David T. Shapiro, *Be Careful What You Wish: U.S. Politics and the Future of the National Security Exception to the GATT*, 31 GEO. WASH. J. INT'L L. & ECON. 97 (1997). But see Craig Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising under International Law on the Eve of the Second Summit of the Americas?* 32 INT'L LAW. 51 (1998).

<sup>7</sup> See, e.g., Saturnino E. Lucio II, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996: A Critical Analysis*, 27 INTER-AM. L. REV. 340 (1996).

ing of loans to Cuba by international financial institutions.<sup>22</sup> Title II contains various measures concerning "assistance to a free and independent Cuba."<sup>23</sup> It accordingly defines the conditions to be met prior to the lifting of economic sanctions, as well as the political and economic system required, to determine the existence of a "democratically elected government."<sup>24</sup> Title III is aimed primarily at preventing anyone from "trafficking" in U.S. property that was "confiscated" (i.e., property whose owner was not given prompt, adequate and effective compensation). To that end, any U.S. national who claims that his or her property was confiscated by the Cuban Government after January 1, 1959, may initiate an action in a U.S. court against a person engaged in such trafficking.<sup>25</sup> For the purpose of this title, a person traffics in confiscated property when

that person knowingly and intentionally—

- (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
- (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
- (iii) causes, directs, participates in, or profits from, trafficking . . . through another person, without the authorization of any United States national who holds a claim to the property.<sup>26</sup>

The right to bring an action under title III can be suspended by the U.S. President for consecutive six-month periods on the condition that the President report to Congress that the suspension is necessary to the U.S. national interest and will expedite a transition to democracy in Cuba.<sup>27</sup> Similarly, the objective of title IV is to prevent aliens from trafficking in confiscated property. It therefore obliges the U.S. authorities to exclude foreigners trafficking in such property from entry into the United States. This provision also applies to the spouse, minor child or agent of the alien who traffics in such property.<sup>28</sup>

As for the D'Amato Act, its purpose is twofold: first, to induce Iran to discontinue its support for international terrorism and its nuclear, chemical, biological and missile weapons programs; and, second, to force Libya to comply with UN Security Council Resolutions 731, 748 and 883, end its support for international terrorism, and abandon its efforts to develop and acquire weapons of mass destruction.<sup>29</sup> To attain these objectives, the Act obliges the U.S. President to impose penalties on persons making certain types of new investments in Iran or Libya that assist these countries in developing their oil or natural gas resources. In the case of Libya, the Act covers the sale of specified goods, services and technology in violation of Security Council Resolutions 748 and 883.

A waiver of the sanctions may be granted, however, to nationals of countries that implement "substantial measures, including economic sanctions," to prevent Iran from acquiring weapons of mass destruction and supporting international terrorism.<sup>30</sup> No

<sup>22</sup> *Id.*, §104(a)(2)(B).

<sup>23</sup> Helms-Burton Act, *supra* note 1, tit. II.

<sup>24</sup> *Id.*, §206.

<sup>25</sup> *Id.*, §302(a)(1).

<sup>26</sup> *Id.*, §4(13).

<sup>27</sup> *Id.*, §306(b).

<sup>28</sup> *Id.*, §401(a).

<sup>29</sup> D'Amato Act, *supra* note 2, §2.

<sup>30</sup> *Id.*, §4(c). This section states:

The President may waive the application of section 5(a) [sanctions with respect to Iran] with respect to nationals of a country if—

- (1) that country has agreed to undertake substantial measures, including economic sanctions, that will inhibit Iran's efforts to carry out activities described in section 2 [supporting international terrorism and

such blanket waiver is possible for transactions with Libya. The U.S. President may, however, grant an individual waiver in the case of Libya, but only when it importantly serves the national interest.<sup>31</sup> The D'Amato Act provides six penalties, of which two or more must be imposed by the President on persons or entities that knowingly violate the Act: (1) denial of U.S. Export-Import Bank assistance; (2) denial of the right to receive U.S. exports; (3) denial of loans from U.S. financial institutions; (4) certain limitations on its activities when the violator is a financial institution; (5) exclusion from U.S. government procurement; and (6) restriction of the right to import goods into the United States.<sup>32</sup> Nevertheless, the President has a certain degree of discretion, since he may decide not to impose these penalties when it is important to the U.S. national interest that he exercise his waiver authority<sup>33</sup> or when he initiates consultations between the United States and "the government with primary jurisdiction" over the foreign person or entity found to have been in violation of the Act.<sup>34</sup>

### III. THE EU-U.S. AGREEMENT

As mentioned above, at the EU-U.S. summit of May 18, 1998, the parties resolved their transatlantic dispute concerning the Helms-Burton and D'Amato Acts through negotiations. At this summit, the parties agreed on (1) the establishment of the Transatlantic Partnership on Political Cooperation, which would promote the more effective attainment of shared goals through economic and political cooperation; and (2) a package relating to the two Acts, by which the United States would limit the impact of certain provisions on European companies and citizens. In return, the European Union agreed to freeze any further action in the WTO on the alleged U.S. violation of the organization's rules through the implementation of the two Acts.

The first part of the 1998 Agreement, although dealing with some issues relating to the Helms-Burton and D'Amato Acts, primarily concerns measures to reinforce the "New Transatlantic Agenda" launched in December 1995. It was hoped that the Transatlantic Partnership on Political Cooperation would strengthen political and economic cooperation on matters pertaining to peace, democracy and prosperity. It envisages the exchange of information, analysis and early consultations to avert friction in transatlantic relations on issues that could threaten international stability and security, and to promote greater cooperation in formulating responses to such issues, be they diplomatic, political, or economic through the use of multilateral sanctions.

The issue that is most linked to the conflict relating to the Helms-Burton and D'Amato Acts concerns the unilateral imposition of economic sanctions by one of the parties. Under the 1998 Agreement, this party must ensure, among other things, that it will "not seek or propose, and will resist, the passage of new economic sanctions legislation based

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developing nuclear, chemical, biological and missile weapons programs] and information required by subsection (b) (1) has been included in a report submitted under subsection (b); and

(2) the President, at least 30 days before the waiver takes effect, notifies the appropriate congressional committees of his intention to exercise the waiver.

<sup>31</sup> *Id.*, §9(c)(1). This section provides as follows:

The President may waive the requirement in section 5 to impose a sanction or sanctions on a person described in section 5(c), and may waive the continued imposition of a sanction or sanctions under subsection (b) of this section, 30 days or more after the President determines and so reports to the appropriate congressional committees that it is important to the national interest of the United States to exercise such waiver authority.

<sup>32</sup> *Id.*, §6.

<sup>33</sup> *Id.*, §9(c)(1). See *supra* note 31.

<sup>34</sup> D'Amato Act, *supra* note 2, §9(a)(2)(c).

a foreign policy grounds which is designed to make economic operations of the other behave in a manner similar to that required of its own economic operators."<sup>35</sup> Undoubtedly, this proviso was demanded by the European Union to prevent the enactment of further legislation such as the Helms-Burton and D'Amato Acts. It seeks to obligate the U.S. President to use his veto to "resist" the adoption of legislation imposing economic sanctions for foreign policy purposes.

The remainder of the 1998 Agreement reflects the desire of both parties to find a political compromise on the ongoing controversy surrounding the two Acts. To demonstrate the issues underlying the conflict, the Europeans reiterated their position that the retroactivity of the contested Acts, their imposition of secondary boycotts and their extraterritorial effect are contrary to international law.<sup>36</sup> The primary objectives of the European Union were therefore to neutralize these aspects of the Acts. Pursuant to the 1997 Understanding, the United States had already committed itself to continuing the suspension of title III of the Helms-Burton Act "during the remainder of the President's term so long as the EU and other allies continue their stepped up efforts to promote democracy in Cuba."<sup>37</sup> In the 1998 Understanding, the parties "recalled" their pledge in the 1997 Understanding, quoted above, to "step up their efforts to develop agreed disciplines and principles for the strengthening of investment protection" in bilateral consultations.<sup>38</sup> The parties had acknowledged in the 1997 Understanding that the standard of protection governing expropriation and nationalization embodied in international law should be respected by all states. In addition, that Understanding recognized the issue at the heart of the Cuban-American conflict by providing that any future MAI disciplines

should inhibit and deter the future acquisition of investments from any State which has expropriated or nationalized such investments in contravention of international law, and subsequent dealings in covered investments. Similarly, and in parallel, the EU and U.S. will work together to address and resolve through agreed principles the issue of conflicting jurisdictions, including issues affecting investors of another party because of their investments in third countries.<sup>39</sup>

Finally, the Clinton administration had promised to initiate consultations with Congress for the purpose of amending the Helms-Burton Act to authorize the President to waive title IV once the bilateral consultations mentioned above were completed and the European Union had adhered to the agreed disciplines and principles. In the meantime, until such an amendment became law, title IV would be enforced as required by the Act.

With regard to the D'Amato Act, the 1997 Understanding had referred to the common efforts made under the New Transatlantic Agenda to eradicate terrorism and inhibit the spread of weapons of mass destruction. Thus, the 1997 Understanding recognized that the President would continue to implement the D'Amato Act but also noted that the United States welcomed the measures taken to date by the European Union on this subject. The United States indicated that it was prepared to grant waivers to EU member states under section 4(c) with regard to Iran and to EU companies under section 9(c) with regard to Libya, if the required conditions were met. In return for these U.S. concessions, the European Union had agreed to suspend the proceedings of the WTO

<sup>35</sup> Transatlantic Partnership on Political Cooperation, *supra* note 12, para. 2(h).1 (unofficial text supplied by the EU Commission).

<sup>36</sup> EU Unilateral Statement, *supra* note 18.

<sup>37</sup> 1997 Understanding, *supra* note 11, 36 ILM at 529.

<sup>38</sup> 1998 Understanding, *supra* note 12, preamble (quoting 1997 Understanding, *supra* note 11, 36 ILM at 529).

<sup>39</sup> 1997 Understanding, *supra* note 11, 36 ILM at 529-30.

panel it had initiated but reserved the right to resume them, or start new proceedings, "if action is taken against EU companies or individuals under Title III or Title IV of the Libertad Act or if the waivers under [the D'Amato Act] referred to above are not granted or are withdrawn."<sup>40</sup> Thus, while the United States emphasized the common position reached on disciplines and principles in the MAI negotiations and continued cooperation against terrorism and nuclear proliferation, the Europeans demanded an exemption for their companies from the most controversial aspects of both the Helms-Burton and the D'Amato Acts.

The 1998 Agreement builds on the foundation created by the 1997 Understanding by including U.S.-EU agreement on the disciplines referred to above as part of the Understanding with Respect to Disciplines for the Strengthening of Investment Protection. The parties' intention is to submit joint proposals on such matters in the MAI negotiations and, as a matter of policy, to apply and uphold the disciplines and modalities of the 1998 Understanding prior to its entry into force. Having agreed on disciplines for a joint proposal in the MAI negotiations, the European Union could reiterate its demands in the 1997 Understanding and insist that the United States now implement its commitments. The Europeans conditioned their continued willingness to abide by the 1997 Understanding on U.S. movement toward implementing the disciplines for strengthening investment protection and granting waivers to the member states under title IV of the Helms-Burton Act.<sup>41</sup> Only after these conditions are met will the European Union adhere to the terms of the 1998 Understanding.

At that time, the European Union will implement the disciplines and will not invoke a WTO dispute settlement proceeding against the United States in response to the Helms-Burton and D'Amato Acts, assuming that the following four conditions have been met: (1) the waiver of title III of the Helms-Burton Act remains in effect; (2) the waiver authority under title IV has been exercised; (3) no action has been taken against EU companies or individuals under the D'Amato Act; and (4) waivers under this Act have been granted. Although in its unilateral statement, the Union referred to the country waiver under section 4(c) of the D'Amato Act with regard to Iran and stated that "it is axiomatic that infrastructural investment in the transport of oil and gas through Iran be carried out without impediment,"<sup>42</sup> Undersecretary of State Eizenstat testified, before the House Committee on International Relations, that it was not a section 4(c) waiver that "would eliminate any further application of [the Act] to the [EU]."<sup>43</sup> On the contrary, Eizenstat declared, it would be an individual waiver under section 9(c). He went on to state that such waivers would not be granted if a pipeline is built across Iran. In fact,

<sup>40</sup> *Id.*, 36 ILM at 530.

<sup>41</sup> EU Unilateral Statement, *supra* note 18. Moreover, several of the modalities of the 1998 Understanding recall certain commitments made last year by the United States that have not yet materialized:

4. The U.S. Administration will continue intensive consultations with the Congress with a view to obtaining an amendment to Title IV of the Libertad Act that would provide authority for a waiver that would apply, with respect to the EU, without a specific time limit, so long as this Understanding is in effect. Application of the disciplines and exercise of such waiver authority will be simultaneous.

5. The U.S. Administration is prepared, in the light of the EU's developing efforts to promote democracy and human rights in Cuba, to take soundings of Congressional opinion and consult Congress with a view to obtaining a Title III waiver provision that would have no specific time limit, so long as these efforts continue and bearing in mind the duration of the presumption of Title III waiver in the April 1997 Understanding.

1998 Understanding, *supra* note 12, paras. II(4), (5).

<sup>42</sup> EU Unilateral Statement, *supra* note 18.

<sup>43</sup> *Capitol Hill Hearing with Defense Department Personnel* 18, Fed. News Service, June 3, 1998 (Hearing of the House Committee on International Relations) <www.fednews.com> [hereinafter House Hearing].

building such a pipeline would be considered as contrary to the U.S. national interest since it "would give Iran a potential chokehold over the economic and political developments in the Caucasus and Central Asian states."<sup>44</sup>

The 1998 Understanding is thus an essential part of the 1998 Agreement, confirming the parties' intention of jointly proposing the agreed disciplines in the negotiations on the MAI and of applying these disciplines, as well as the "modalities" contained in the Understanding, as a matter of policy prior to the entry into force of the MAI. The Understanding distinguishes between general disciplines and specific disciplines. While the general disciplines reflect the positions of the parties on how they perceive the international protection of property rights, the specific disciplines are meant to offer the EU and U.S. views on the most appropriate regime to apply to properties expropriated in contravention of international law. Accordingly, the participants committed themselves to (1) strengthen the international protection of property rights in the context of investment protection; (2) take joint action to enforce the observance of international law standards on expropriation, emphasizing the undesirability of investment in property expropriated in contravention of international law;<sup>45</sup> (3) establish a registry centralizing alleged claims of expropriated properties in contravention of international law by states rather than the participants; and (4) encourage international financial institutions to adopt resolutions relating to expropriation claims in violation of international law and measures discouraging certain transactions in such expropriated properties.<sup>46</sup>

Certain specific disciplines are to be applied when properties have been expropriated in contravention of international law. The Understanding requires the participants to

<sup>44</sup> EU Unilateral Statement, *supra* note 18, para. 8.

<sup>45</sup> The participants employ the "Hull formula" for determining the "international standards on expropriation." (See also pt. II *supra*.) In fact, the provision relating to expropriation and compensation in the MAI negotiating text of April 24, 1998, *supra* note 10, requires:

2.1 A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except:

- a) for a purpose which is in the public interest,
- b) on a non-discriminatory basis,
- c) in accordance with due process of law, and
- d) accompanied by payment of prompt, adequate and effective compensation in accordance with

Article 2.2 to 2.5 below.

2.2 Compensation shall be paid without delay.

2.3 Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.

2.4 Compensation shall be fully realisable and freely transferable.

2.5 Compensation shall include interest at a commercial rate established on a market basis for the currency of payment from the date of expropriation until the date of actual payment.

<sup>46</sup> 1998 Understanding, *supra* note 12, para. I.A. For the participants a "covered transaction" means any future transaction related to property expropriated by a state other than a participant insofar as it gives rise to

(a) a direct ownership interest in such a property (e.g. purchase of expropriated property, obtaining mineral rights (to the extent that these were included in the expropriated property));

(b) control of all or part of an expropriated property (e.g. lease of the expropriated property or a management or development contract);

(c) the acquisition of effective control or a determining interest in an entity owning or controlling expropriated property under (a) or (b) insofar as the property constitutes a significant proportion of the assets of that entity or the expropriated property is a fundamental element of the transaction.



take action in the form of (a) joint or coordinated diplomatic representations to the expropriating state; (b) denial of government support for certain transactions in expropriated properties; (c) denial of government commercial assistance for such transactions in expropriated properties; and (d) publication of a list of expropriated properties and issuance of public statements discouraging covered transactions in those properties. Moreover, if one of the participants believes that a record of repeated expropriations in contravention of international law has been established in a nonparticipating country, the participant is to inform the other participant of this fact so that the latter may protect its investors. When the conditions of the Understanding are met, the disciplines are to apply simultaneously.<sup>47</sup>

According to its terms, the 1998 Understanding will apply retroactively from May 18, 1998, forward.<sup>48</sup> It does not, however, affect (1) covered transactions relating to an expropriated property or a right to an expropriated property that an investor of one of the participants acquired from the expropriating state prior to May 18, 1998, or (2) covered transactions by a participant's other investors who subsequently acquired that property or property right. In other words, the 1998 Understanding does not apply to investors who, prior to May 18, 1998, already owned a right in property expropriated in violation of international law. Similarly, if a new investor should acquire a right in such property, the disciplines would not apply. However, an investor who acquires a right or extends that right in expropriated property, for example, by renewing or upgrading that right, would be subject to the disciplines of the Understanding.<sup>49</sup>

Although the 1998 Understanding is aimed at strengthening investment protection, the spirit of the Helms-Burton Act runs throughout the document and several concessions to this legislation were made by the European Union. Thus, Undersecretary Eizenstat could assure Congress that these agreed disciplines represent "a historic breakthrough" that "builds on the Libertad Act and represents an enormous step forward in protecting property rights of U.S. investors anywhere abroad." "For the first time," he declared, "we have established multilateral disciplines among major capital-exporting countries to inhibit and deter investment in properties which have been expropriated inconsistent with international law."<sup>50</sup> Indeed, this was his most important argument in the unsuccessful attempt to persuade Congress to amend title IV of the Helms-Burton Act to give the President the authority to issue a waiver as required by the 1998 Agreement.

#### IV. CONCLUSION

On May 18, 1998, the European Union and the United States established the conditions for a political settlement of the ongoing dispute over the Helms-Burton and D'Amato Acts. Although one must applaud the effort to settle international disputes amicably, the 1998 Agreement, which is not legally binding, leaves many questions unanswered. Among these questions is whether this soft law agreement may prove to have more legal force than intended by the participants. It probably will be perceived as binding by the policy makers on both sides who committed themselves to it. Will Congress and the EU member states be able to reverse the progress made in the Agreement?

The 1998 Agreement supports U.S. Acts that have been criticized as incompatible with international law. It serves to end their negative consequences only for the European Union but leaves the circumstances for other states unaltered. This situation probably

<sup>47</sup> See 1998 Understanding, *supra* note 12, para. II.4.

<sup>48</sup> See *id.*, para. I.C.

<sup>49</sup> See *id.*; House Hearing, *supra* note 43, at 17.

<sup>50</sup> House Hearing, *supra* note 43, at 12.

violates U.S. obligations under several international treaties. For example, these Acts appear to impede the attainment of several objectives under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS).<sup>51</sup> In addition, if the Acts violate the WTO, the 1998 Agreement constitutes an arrangement between the participants to avoid WTO obligations in violation of *pacta sunt servanda* and good faith doctrines. If, every time their national interest requires it, WTO members could negotiate separate (soft or hard law) agreements infringing both the letter and the spirit of the WTO system, would this license not jeopardize the whole mutually interdependent WTO system? Finally, the Agreement is proclaimed as a victory in the United States because the European Union supposedly acknowledged the illegality of the Cuban expropriations.<sup>52</sup> This acknowledgment is nowhere to be found in the text of the 1998 Understanding. Only its Annex D contains a statement on the matter by Sir Leon Brittan. The statement discusses the apparent illegality of some cases that were investigated by the European Commission. If other cases are similar, they, too, might be found to be contrary to international law, but this remains to be investigated.

In sum, when the European Union declared its willingness to pursue dispute settlement proceedings before the WTO, some feared that the system would be placed at risk by the threat to invoke the national security exception to the WTO. It was thus considered preferable to settle the case outside the WTO institutions. However, the 1998 Agreement does not appear to serve the objectives of the WTO either, since it establishes a side agreement that permits the United States to avoid its WTO obligations to the European Union. Perhaps it would have been better to test the commitment of the parties to the world trading system by seeking a clear decision under the WTO dispute settlement process that would clarify the matter not only as between the United States and the European Union, but to the benefit of the entire world trading system.

STEFAN SMIS AND KIM VAN DER BORCHT\*

## THE FIFTIETH SESSION OF THE INTERNATIONAL LAW COMMISSION

The International Law Commission held its fiftieth session in Geneva from April 20 to June 12, 1998, and in New York from July 27 to August 14, 1998, under the chairmanship of João Clemente Baena Soares of Brazil.<sup>1</sup>

The Commission began its second reading on state responsibility, producing clarified and simplified articles on structure and attribution; completed a first reading of a set of articles on "prevention"; initiated work on guidelines for states concerning reservations

<sup>51</sup> See General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XXIII, TIAS No. 1700, 55 UNTS 188; General Agreement on Trade in Services, Apr. 15, 1994, Art. XXIII, *reprinted in* 33 ILM 1167 (1994).

<sup>52</sup> See Secretary of State Madeleine K. Albright, *Statement on U.S.-EU Understanding on Expropriated Property* (London, May 18, 1998) (visited Aug. 3, 1998) <[www.secretary.state.gov/www/statements/index.html](http://www.secretary.state.gov/www/statements/index.html)>; White House Fact Sheet on Expropriation Understanding 2 (London, May 18, 1998) (visited Aug. 3, 1998) <[www.useu.be/summit](http://www.useu.be/summit)>; House Hearing, *supra* note 43, at 12.

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<sup>1</sup> The Commission had decided at its 49th session to experiment with splitting its session into two parts. The precise timing was a function, *inter alia*, of the timing of the Rome Conference on a statute for an international criminal court (a 1995 draft prepared by the ILC was the basis, together with modifications made by the Preparatory Committee, for the conference's work). The general sense of the members of the Commission was that the split session had been a good idea and the ILC is recommending that a split session be held again in the year 2000. It might also be noted that the attendance rate was markedly higher in New York than it has been in Geneva in recent years.

to treaties; reviewed the initial reports of the new Special Rapporteurs for unilateral acts of states and diplomatic protection; suggested parameters for work on these topics; and explored aspects of nationality in relation to succession of states. The Commission also elaborated a tentative list of future topics.

The busy and productive fiftieth session also found time for a seminar<sup>2</sup> and a symposium conducted by the Graduate Institute of International Studies in Geneva and the American Society of International Law in honor of the Commission's fiftieth anniversary.

### *State Responsibility*

The Commission received the first report of its new special rapporteur, Professor James Crawford.<sup>3</sup> The report reaffirmed the focus on secondary rules of state responsibility<sup>4</sup> and made a series of recommendations to rationalize Part One, Origin of international responsibility, chapters I (General principles) and II (The act of the State under international law—i.e., attribution), and to delete the notion of "crimes" from Article 19.<sup>5</sup> The special rapporteur questioned whether the articles, particularly in Part Two, Content, forms and degrees of international responsibility, were sufficiently detailed or broad. He noted as meriting particular consideration, in this connection, reparation, including interest, *erga omnes* violations and joint responsibility of states. The Commission also had before it the written comments of governments on the draft as it had emerged on first reading.<sup>6</sup>

The special rapporteur recommended, and most members of the Commission concurred, that the question of the form the draft should take, as a convention or a declarative statement, should be deferred.

The special rapporteur's recommendations concerning chapters I and II constituted a deft wielding of Occam's razor<sup>7</sup> to eliminate duplication and clarify a few points. The Commission followed these recommendations with only relatively minor departures.<sup>8</sup> The changes include the deletion of Article 2 on the ground that its content was implicit in Article 1,<sup>9</sup> the deletion of references to international organizations and organs of

<sup>2</sup> See Report of the International Law Commission on the work of its fiftieth session, UN GAOR, 53d Sess., Supp. No. 10, para. 546, UN Doc. A/53/10 and Corr. 1 (1998) [hereinafter 1998 Report].

<sup>3</sup> First report on State Responsibility, UN Doc. A/CN.4/490 and Add.1-6 (1998). Professor Crawford is the fifth special rapporteur for this topic, succeeding F. V. García Amador, Roberto Ago, Willem Riphagen and Gaetano Arangio-Ruiz.

<sup>4</sup> See *id.*, paras. 12-18. As stated by then Special Rapporteur Ago, "it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation. Only the second aspect comes under the sphere of responsibility proper." Report of the International Law Commission on the work of its twenty-second session, [1970] 2 Y.B. Int'l L. Comm'n at 271, 306, para. 66(c), UN Doc. A/CN.4/SER.A/1970/Add.1.

<sup>5</sup> Part One of the draft on state responsibility, as it had emerged on first reading, consists of four chapters dealing with (1) factors that give rise to state responsibility, (2) the elements used to determine when to place responsibility on a particular state, (3) the distinctions among types of state responsibility, and (4) circumstances precluding wrongfulness. See Report of the International Law Commission on the work of its twenty-ninth session, [1977] 2 Y.B. Int'l L. Comm'n at 9, UN Doc. A/CN.4/SER.A/1977/Add.1 (Part 2) [hereinafter 1977 Report].

<sup>6</sup> UN Doc. A/CN.4/488 and Add.1-3 (1998). Comments were submitted per request of the General Assembly. GA Res. 51/160, para. 5 (Dec. 16, 1996).

<sup>7</sup> William of Occam: *Entia non sunt multiplicanda praeter necessitatem*, or "Keep it simple."

<sup>8</sup> Technically, it is not proper to say that the Commission took any decisions concerning the draft articles since the commentaries were not ready and it is firm and wise policy for the Commission not to adopt articles without commentaries. The texts are therefore as proposed by the Drafting Committee and noted by the plenary. They are likely to be formally adopted at the 1999 session of the Commission as is, once the commentaries are provided.

<sup>9</sup> Article 2 read: "Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility."

resurrection movements where necessary to reflect the fact that the current topic is limited to the responsibility of states,<sup>10</sup> and the deletion of articles proclaiming the inapplicability of state responsibility as redundant of earlier articles and serving no function other than to confuse.<sup>11</sup> Drafting changes to Articles 4 and 5 were made to underscore the fact that international law "governs" in the event of any conflict with internal law, as was clear from the commentary to the articles as they emerged on first reading but, in the view of some, was less clearly expressed in the text of the articles themselves.

Chapters I and II now read as follows:

CHAPTER I. GENERAL PRINCIPLES

*Article 1. Responsibility of a State for its internationally wrongful acts*

Every internationally wrongful act of a State entails the international responsibility of that State.

*Article 2. [deleted]*

*Article 3. Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

*Article 4. Characterization of an act of a State as internationally wrongful*

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II. THE ACT OF THE STATE UNDER INTERNATIONAL LAW

*Article 5. Attribution to the State of the conduct of its organs*

1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of that State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.

*Article 6. [deleted]*

*Article 7. Attribution to the State of the conduct of entities exercising elements of the governmental authority*

The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question.

<sup>10</sup> An additional savings clause, entitled "Responsibility of or for conduct of an international organization," to be inserted at the appropriate place, reads as follows: "These draft articles shall not prejudice any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization."

<sup>11</sup> Former Articles 2, 6, and 11-14 were deleted.

*Article 8. Attribution to the State of conduct in fact carried out on its instructions or under its direction or control*

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

*Article 8 bis. Attribution to the State of certain conduct carried out in the absence of the official authorities*

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

*Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State*

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

*Article 10. Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions*

The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise.

*Articles 11 to 14 [deleted]*

*Article 15. Conduct of an insurrectional or other movement*

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 5 to 10.

*Article 15 bis. Conduct which is acknowledged and adopted by the State as its own*

Conduct which is not attributable to a State under articles 5, 7, 8, 8 bis, 9 or 15 shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

As mentioned above, the special rapporteur in his report recommended the deletion of the notion of "crimes" from Article 19. The plenary debate on this issue revealed a continuing lack of agreement on the notion of so-called international crimes of states. There was substantial support for the special rapporteur's proposal to delete the notion. Some believed it should simply be deleted as inappropriate and without foundation in state practice or judicial decisions and opinions, dicta or otherwise. Others acknowledged that the term "crime" was unfortunate and misleading and stated that it should not be understood in the domestic law sense; they nevertheless urged the retention

of a qualitative distinction between ordinary breaches and the most serious breaches, which, they noted, often involve the violation of *erga omnes* obligations and rules of *jus cogens*.<sup>12</sup>

The special rapporteur drew up the following interim conclusions, which were included in the report without objection:

Following the debate, and taking into account the comments of the Special Rapporteur, it was noted that no consensus existed on the issue of the treatment of "crimes" and "delicts" in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (a) without prejudice to the views of any member of the Commission, draft article 19 would be put to one side for the time being while the Commission proceeded to consider other aspects of Part One; (b) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19; (c) this consideration would occur, in the first instance, in the Working Group established on this topic, and also in the Special Rapporteur's second report; (d) in the event that no consensus was achieved through this process of further consideration and debate, the Commission would return to the questions raised in the first report as to draft article 19, with a view to taking a decision thereon.<sup>13</sup>

According to the schedule the Commission has set for itself, part I, including Article 19, and part II (except for countermeasures) are to be completed at the fifty-first session of the Commission in 1999, with work on countermeasures and part III to follow in the year 2000. With this arduous task in mind, the Commission reiterated its request for government comments and specifically asked the Sixth Committee, *inter alia*:

- if all conduct of an organ of a state is attributable to that state whether it be an act *jure gestionis* or an act *jure imperii*;
- what the appropriate balance should be between elaboration of general principles of reparation and more detailed provisions relating to compensation;
- whether to retain, delete, or replace Article 19;
- the extent to which the circumstances precluding wrongfulness should be treated as entirely precluding responsibility;
- the definition of "injured State" in draft Article 40, especially as it concerns breaches of obligations owed *erga omnes* or to a large number of states; and
- whether the draft articles should seek to regulate countermeasures in detail, and the link between countermeasures and third-party dispute settlement and the provisions of part III on dispute settlement in general.<sup>14</sup>

#### *Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*

This topic was originally a byproduct of the structure or taxonomy of the Commission's work on state responsibility. The draft on state responsibility is based on the premise that responsibility is a consequence of a wrongful act and that, if there is no wrongful act, there is no responsibility. This structure flowed, *inter alia*, from the decision to restrict the work on state responsibility to secondary rules. Moreover, the draft on state respon-

<sup>12</sup> These arguments are well summarized in the ILC 1998 Report, *supra* note 2. They are extensively discussed, *inter alia*, in Robert Rosenstock, *An International Criminal Responsibility of States? in INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY: VIEWS FROM THE INTERNATIONAL LAW COMMISSION* 265, UN Sales No. E/F.97.V.4 (1997) (arguing for deletion); and by Alain Pellet, *Vive le crime! Remarques sur les degrés de l'illicite en droit international*, in *id.* at 287 (arguing for the retention of the notion of crimes by states).

<sup>13</sup> 1998 Report, *supra* note 2, para. 331.

<sup>14</sup> Author's summary of *id.*, paras. 35-37.

sibility contains a chapter on "circumstances precluding wrongfulness"—dealing with countermeasures, *force majeure*, distress, necessity and self-defense—acts that would be wrongful but for the existence of one or more of the aforementioned. The same chapter goes on to state, in Article 35, that preclusion of wrongfulness does not prejudice any question that may arise in regard to compensation for damage caused by "an act which is not wrongful." This leaves open the question of who should bear or how to distribute the loss that state *A* suffers as a result of conduct of state *B* that causes harm but is unarguably not wrongful. The term "liability" was used in English to distinguish the situation from one involving "responsibility." It is an amusing and perhaps revealing fact that the verbal distinction does not work at all in the other official languages. The Commission has explored a variety of approaches to the complex of issues involved.<sup>15</sup>

In 1997, at its forty-ninth session, the Commission decided to separate what it regarded as the two distinct aspects of the topic, "prevention" and "international liability." In addition, the Commission decided to commence work on "Prevention of transboundary damage from hazardous activities" and to appoint P. S. Rao as special rapporteur for the issue of "prevention."<sup>16</sup>

Special Rapporteur Rao's first report<sup>17</sup> contained a summary of the work done to date, including comments on the drafts that had been prepared in 1994 and 1996. He proposed a list of principles of procedure (prior authorization, impact assessment, notification, consultation and negotiation, dispute settlement and nondiscrimination). He also proposed what he denominated as principles of content, which in his view "might include" precaution, polluter pays, and equity, capacity building and good governance.

Discussion in the plenary meeting revealed less widespread agreement on some of the principles of content than on those of procedure. The Commission convened a working group to assist the special rapporteur in his review of the draft articles adopted by the working group in 1996.<sup>18</sup> On the basis of the discussion in the 1998 working group, the 1996 draft and the watercourses text,<sup>19</sup> the special rapporteur proposed a revised set of draft articles focusing on prevention.<sup>20</sup> After making relatively few changes in this draft, the Drafting Committee proposed and the plenary approved, on first reading, a complete set of draft articles and commentaries on prevention of transboundary damage from hazardous activities.<sup>21</sup>

The articles "apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm"<sup>22</sup> through their physical consequences (Article 1). The limitation of the harm to physical harm and the exclusion of harm to areas beyond national jurisdiction have long been built into the exercise

<sup>15</sup> For an excellent, succinct history of the item, see P. S. Rao, First report on prevention of transboundary damage from hazardous activities, UN Doc. A/CN.4/487 and Add.1 (1998). For a spirited and provocative argument to the effect that the initial decision to separate the issue from that of state responsibility was misguided, that there is no fundamental difference between liability and responsibility, and consequently that all subsequent work by the Commission on this topic is flawed, see Louise de La Fayette, 6 RECIEL 322, 322-33 (1997). Basically, she argues that the obligation to prevent harm is an obligation of result and that if harm occurs there has been a breach, and then—presto—the law of responsibility applies.

<sup>16</sup> Report of the International Law Commission on the work of its forty-ninth session, UN GAOR, 52d Sess., Supp. No. 10, at 130-31, UN Doc. A/52/10 (1997).

<sup>17</sup> *Supra* note 15.

<sup>18</sup> See Report of the International Law Commission on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No. 10, Annex 1, UN Doc. A/51/10 (1996).

<sup>19</sup> Convention on the Law of Non-Navigational Uses of International Watercourses, GA Res. 51/229, annex (May 21, 1997), 36 ILM 700 (1997).

<sup>20</sup> See UN Doc. A/CN.4/256 (1998).

<sup>21</sup> 1998 Report, *supra* note 2, paras. 46-54.

<sup>22</sup> Transboundary harm is defined in Article 2 as "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border."

and are sensible in terms of keeping the exercise manageable. Risk is defined as a "low probability of causing disastrous harm or a high probability of causing significant harm" (Article 2). The obligation of prevention is contained in Article 3 and is an obligation of conduct requiring due diligence.<sup>23</sup> The remaining articles (4-17) deal, inter alia, with cooperation; the requirement of prior authorization; impact assessment; providing information "to the public likely to be affected"; notification; consultations on preventive measures; factors involved in an equitable balance of interests; exchange of information; nondiscrimination on the basis of nationality, residence or place of injury; and dispute settlement. The articles draw heavily on the 1996 draft and the Commission's prior work on watercourses.<sup>24</sup> The provisions are somewhat more general than in the Watercourses Convention because of the greater generality of the subject matter and the fact that no decision has been taken as to the final form of the articles. The provisions of the 1996 draft that went beyond prevention and dealt with liability were omitted in light of the decision to limit the focus, at least initially, to prevention.

It is noteworthy that the Commission finished its first reading a year earlier than expected. Where the Commission goes from here regarding some or all aspects of the overall topic will depend in large measure on the reactions from governments as expressed in the Sixth Committee and in written comments.

### *Reservations to Treaties*

In accord with prior decisions of the Commission, the third report of the special rapporteur<sup>25</sup> took the position that the regime established by the Vienna Conventions of 1969, 1978 and 1986<sup>26</sup> should be preserved and that the end product should be a guide to practice that would fill lacunae and remedy and clarify ambiguities. The report focused on the definition of reservations and interpretive declarations. The special rapporteur identified the elements of a reservation under the Vienna system as "a unilateral statement at the time a State expressed its consent to be bound which was intended to exclude or modify the legal effect of certain provisions of the treaty." An interpretive declaration was identified as "a statement which sought to clarify its view of the meaning." The special rapporteur stressed that the nature of a unilateral act as a "reservation" or an interpretive declaration was not a function of the term used but of the intent of the author, which, he suggested, should be analyzed in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969.

The Commission provisionally approved the following guidelines at its fiftieth session.

#### *1. DEFINITIONS*

##### *1.1 Definition of reservations*

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying,

<sup>23</sup> Article 3 states: "States shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm."

<sup>24</sup> See *supra* note 19.

<sup>25</sup> UN Doc. A/CN.4/491 and Add.1-6 (1998) [hereinafter Reservations Report].

<sup>26</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331; Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, UN Doc. A/CONF.80/31, 17 ILM 1488 (1978); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Mar. 21, 1986, UN Doc. A/CONF.129/15, 25 ILM 543 (1986).



formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

### *1.1.1 Object of reservations*

A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which a State, or an international organization, intends to apply the treaty as a whole.

### *1.1.2 Instances in which reservations may be formulated*

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

### *1.1.3 Reservations having territorial scope*

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement, constitutes a reservation.

### *1.1.4 Reservations formulated when notifying territorial application*

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

### *1.1.7 Reservations formulated jointly*

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.<sup>27</sup>

The Commission also approved a paragraph that states: "Defining a unilateral statement as a reservation is without prejudice to its permissibility and its effects under the rules relating to reservations." The title and location of this guideline are to be determined at a later stage.

In addition to reviewing paragraphs 1.5 and 1.6,<sup>28</sup> as proposed by the special rapporteur, the Commission will continue its study of interpretive declarations and the distinction between interpretive declarations and reservations,<sup>29</sup> as well as the other issues that were identified by the special rapporteur in his 1995 report.<sup>30</sup>

<sup>27</sup> 1998 Report, *supra* note 2, para. 540.

<sup>28</sup> Reservations Report, *supra* note 25. Paragraph 1.5 relates to statements designed to increase the obligations of their author, and 1.6 to statements designed to limit same.

<sup>29</sup> See 1998 Report, *supra* note 2, para. 517, for a discussion of the two ways in which interpretive declarations differ from reservations, namely, the temporal and teleological—i.e., when the statement is made and, most fundamentally, the author's purpose in making the statement.

<sup>30</sup> The issues include:

- (1) the precise meaning of the expression "compatibility with the object and purpose of the treaty."
- (2) Is an impermissible reservation null and void or can another state give it effect by consenting to it?
- (3) May contracting states object to permissible reservations and what are the effects of such a reservation? How do they differ, if at all, from objections to an impermissible reservation?
- (4) Can the objecting state exclude the applicability of treaty provisions?

### *Diplomatic Protection*

Special Rapporteur Mohamed Bennouna presented his first report, which, as is usual and necessary at the initial stage, prompted various questions concerning the nature and scope of the topic.<sup>31</sup>

Among the issues raised and discussed in the plenary debate was whether, as some members suggested, diplomatic protection is primarily a tool for the strong and thus inherently discriminatory. Others replied that, far from being an oppressive institution, diplomatic protection mitigates the effect of not considering an individual to be a subject of international law. Other questions included (1) whether diplomatic protection is a right of the state or an individual; (2) whether the relevant rules are primary or secondary, and if the focus is to be on the latter, what about such issues as the nationality link and grounds for exoneration based on the individual's conduct, for example, clean hands, acquiescence and delay? (3) whether the principle of exhaustion of remedies is "procedural" or "substantive"; and (4) whether it is, in all cases, a precondition for diplomatic protection.

After a wide-ranging plenary debate on these and other issues, they were referred to a working group chaired by the special rapporteur. The Commission endorsed the recommendations of the working group, including the following:

- (a) the customary law approach to diplomatic protection should form the basis for the Commission's work on this topic;
- (b) the work should be focused on secondary rules;
- (c) diplomatic protection is the right of the state; the state should take account of the rights and interests of the individual;
- (d) account should be taken of developments in the law concerning the rights of individuals;
- (e) the state has discretion to commit itself to its nationals to exercise the right;
- (f) governments should be requested to provide information concerning significant national legislation, court decisions and practice.<sup>32</sup>

### *Unilateral Acts of States*

The special rapporteur, Victor Rodríguez Cedeño, described his first report on unilateral acts of states as preliminary in nature, with a view to developing a definition of a strictly or purely unilateral act.<sup>33</sup> He excluded from the definition all acts of a nonautonomous nature and political acts, i.e., acts where there was no intent to produce a specific legal effect.<sup>34</sup> The special rapporteur also recommended the exclusion of estoppel on the grounds that it reflected the absence of intent and that its legal consequences flowed from the reliance of other states, meaning that it was not strictly autonomous.

The extent of what the special rapporteur sought to exclude, particularly estoppel, was questioned by several members of the Commission. Others acknowledged the logic of his position but urged examination of estoppel so as to gain a fuller view of acts that come within the strict definition of unilateral acts.

<sup>31</sup> UN Doc. A/CN.4/484 (1998).

<sup>32</sup> Author's summary of 1998 Report, *supra* note 2, para. 108.

<sup>33</sup> UN Doc. A/CN.4/486 (1998).

<sup>34</sup> He excluded a long list of acts not meeting these criteria or otherwise outside the focus of this topic, including acts of international organizations, acts that are wrongful and give rise to responsibility, acts that lead to the formation of customary law and acts in exercise of a power conferred by a treaty.

The working group established at the forty-ninth session was reconvened. The working group endorsed the view of the special rapporteur that the scope of the topic should be limited to unilateral acts of states intended to produce international legal effects and that a "unilateral act [declaration] is an autonomous [unequivocal] and notorious expression of the will of a State." As for estoppel and silence, the working group recommended that they be examined by the special rapporteur at the appropriate time with a view to determining what rules, if any, could be formulated regarding these issues, in the context of unilateral acts of states. The working group recommended that the work on the topic take the form of draft articles with commentaries, with the final form, a convention, guidelines or a restatement, to be subsequently determined.<sup>35</sup> The Commission endorsed these recommendations.<sup>36</sup>

### *Nationality in Relation to the Succession of States*

Under the leadership of its energetic and productive special rapporteur, Václav Mikulka, the Commission commenced consideration of the question of nationality in relation to state succession in the case of legal persons.<sup>37</sup> A working group was established. Its conclusions were denominated as preliminary by the working group and endorsed as such by the Commission. The conclusions included the view that, as the scope of the topic stands, the issues that involve legal persons are too situation specific for the development of rules of general application and that there does not seem to be any pressing need for further work on this question. On the other hand, if the scope of the topic were expanded to that of nationality of legal persons under international law in general or to that of the status of legal persons in general in the case of succession, there would be more utility in pursuing the matter. The Commission asked states to indicate whether further work should be undertaken and, if so, in which of the above ways. The Commission stated that it would interpret an absence of comments as lack of interest by states in further work on the status of legal persons in this context.<sup>38</sup>

### *Long-Term Program of Work*

The Commission took note of the report of its Planning Group identifying the following topics for inclusion in the long-term program of work: "Responsibility of international organizations," "The effect of armed conflict on treaties," "Shared natural resources (confined ground water and single geological structures of oil and gas)" and "Expulsion of aliens."<sup>39</sup>

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<sup>35</sup> See 1998 Report, *supra* note 2, para. 196.

<sup>36</sup> *Id.*, para. 201.

<sup>37</sup> Fourth report on Nationality in relation to the succession of States, UN Doc. A/CN.4/489 (1998).

<sup>38</sup> See 1998 Report, *supra* note 2, paras. 460–68.

<sup>39</sup> The recommendation for the topics was the result of examination of a range of possible future topics by a working group chaired by Ian Brownlie. In making its selection, the group was guided, *inter alia*, by the needs of states and the ripeness of the topic for progressive development and codification. The group identified several additional potential topics, which it will consider further during its 51st session on the basis of feasibility studies being undertaken by several Commission members. *Id.*, para. 551.

\* Member, International Law Commission. The views in this report are those of the author and do not necessarily represent those of the United States Government.

## THE FIFTY-FOURTH SESSION OF THE UN COMMISSION ON HUMAN RIGHTS

## I. INTRODUCTION

The fifty-fourth session of the UN Commission on Human Rights, highlighting the fiftieth anniversary of the adoption of the Universal Declaration of Human Rights, took place in Geneva from March 16 to April 24, 1998, under the chairmanship of Ambassador Jacob Selebi of South Africa. The Commission reviewed the state of human rights and fundamental freedoms in the world and adopted eighty-four resolutions and twelve decisions, three-fourths of them by consensus.<sup>1</sup>

Many foreign ministers and other high-level dignitaries addressed the importance of the Universal Declaration to the promotion and protection of human rights in their countries. President Václav Havel of the Czech Republic and Prime Minister Lionel Jospin of France both called for review and stocktaking on the occasion of the Declaration's half-century.<sup>2</sup> Secretary-General Kofi Annan reminded the Commission that human rights violations remain a widespread reality and that the fiftieth anniversary motto of "all human rights for all" summed up the challenge facing the world today.<sup>3</sup>

The results of the session were mixed. The greatest achievement was the adoption of a Declaration on Human Rights Defenders, but the session also saw an increased emphasis on economic, social and cultural rights. For the first time since 1991, the United States chose not to sponsor a resolution concerning the human rights situation in China, and a resolution on Cuba was defeated.

Several activities of the Commission suggest important developments in international human rights law.<sup>4</sup>

## II. STANDARD SETTING

*Defenders Declaration*

After thirteen years of tortuous negotiation, the Commission unanimously approved a declaration designed to enhance the protection of individuals and groups working to promote and protect human rights, commonly known as the defenders declaration.<sup>5</sup>

The declaration establishes the right of everyone, "individually and in association with others, to promote and strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."<sup>6</sup> It provides that "[e]ach State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms."<sup>7</sup> It further provides:

The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any

<sup>1</sup> The Report of the Commission on Human Rights [CHR] on its fifty-fourth session, UN Doc. E/CN.4/1998/177 [hereinafter Report], contains the resolutions and decisions of the Commission.

<sup>2</sup> CHR Press Releases HR/CN/98/3 (Mar. 16, 1998) and HR/CN/98/4 (Mar. 17, 1998).

<sup>3</sup> Statement by the Secretary-General at 1 (Mar. 16, 1998) (on file with author).

<sup>4</sup> Like similar essays on the 1994-1997 sessions, this is a personal reflection on the Commission's session and not a complete record. See John R. Crook, *The Fiftieth Session of the UN Commission on Human Rights*, 88 AJIL 806 (1994); John R. Crook, *The Fifty-first Session of the UN Commission on Human Rights*, 90 AJIL 126 (1996); Michael J. Dennis, *The Fifty-second Session of the UN Commission on Human Rights*, 91 AJIL 167 (1997); Michael J. Dennis, *The Fifty-third Session of the UN Commission on Human Rights*, 92 AJIL 112 (1998) [hereinafter Dennis, 53d Session].

<sup>5</sup> CHR Res. 1998/7, annex (Apr. 3). The declaration subsequently received final approval from the General Assembly in December 1998.

<sup>6</sup> *Id.*, Art. 1.

<sup>7</sup> *Id.*, Art. 2(1).

violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of their legitimate exercise of the rights referred to in this Declaration.<sup>8</sup>

The final text reflects compromises on several important issues. Whether defenders could receive funding from foreign sources for their work was a major point of contention. The United States and other Western countries argued that the declaration should include an affirmative right to receive contributions from domestic and foreign sources. Others, led by Cuba and China, argued that any such right could be limited by national legislation. The final text provides that "the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms" is subject to "[d]omestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms."<sup>9</sup>

Another difficult issue concerned the balance to be struck between the rights of human rights defenders and their duties to society. The declaration does not provide clear guidance on this point. The text recognizes both the principle that "everyone has duties towards and within the community" and the role and responsibility defenders have "in safeguarding democracy, promoting human rights and fundamental freedoms, and contributing to the promotion and advancement of democratic societies, institutions and processes."<sup>10</sup>

At the close of the session, both the High Commissioner and the chairman called upon all governments to honor the principles contained in the declaration, noting that human rights defenders had continued to be persecuted and even killed during the session.<sup>11</sup>

### *Other Standards*

Little progress was made on the Commission's other standard-setting activities, including working groups on a declaration on indigenous rights, an optional protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment concerning preventive visits, and two optional protocols to the Convention on the Rights of the Child on participation of children in armed conflict and trafficking in the sale of children, child prostitution and child pornography.<sup>12</sup> The Commission did, however, authorize the continuation of each working group.<sup>13</sup>

## III. SCOPE OF HUMAN RIGHTS

There were several initiatives to extend the scope of the Commission's inquiries and authority.

### *Death Penalty*

For the second straight year, the Commission adopted, by a vote of 26 to 13, with 12 abstentions, an Italian-sponsored resolution calling for a worldwide moratorium on executions.<sup>14</sup> Notwithstanding an intensive lobbying campaign by Italy, the resolution

<sup>8</sup> *Id.*, Art. 12(2).

<sup>9</sup> *Id.*, Arts. 3 and 13; *see also* Report of the working group on its thirteenth session, UN Doc. E/CN.4/1998/98, at 5-6, 9.

<sup>10</sup> CHR Res. 1998/7, annex, Art. 18; *see also* Report of the working group, *supra* note 9, at 5.

<sup>11</sup> Statements of Ambassador Selebi at 3, and Mary Robinson at 2 (Apr. 24, 1998) (on file with author).

<sup>12</sup> *See* Dennis, 53*d* Session, *supra* note 4, at 116-18. The reports of the working groups for the 1997-1998 sessions are contained in UN Docs. E/CN.4/1998/106, E/CN.4/1998/42, E/CN.4/1998/102, and E/CN.4/1998/103.

<sup>13</sup> CHR Res. 1998/14 (Apr. 9), 1998/34 (Apr. 17) and 1998/76 (Apr. 22), respectively.

<sup>14</sup> CHR Res. 1998/8 (Apr. 3).

received fewer positive votes and more negative votes than in 1997.<sup>15</sup> Several states, including the United States, spoke in opposition, with particular emphasis on the view that international law permits capital punishment for the most serious crimes. Fifty-one countries signed a statement circulated by Singapore affirming that retention of the death penalty was a matter of sovereign decision making.<sup>16</sup>

In a related matter, the Commission's Special Rapporteur on summary, extrajudicial, and arbitrary executions, Bacre Waly Ndiaye of Senegal, called for a moratorium on capital punishment in the United States.<sup>17</sup> The United States described the rapporteur's report as "severely flawed" in concluding that U.S. use of the death penalty violated any international obligations.<sup>18</sup> Nonetheless, the United States supported renewal of the mandate for the special rapporteur, noting that he had done an outstanding job in Bosnia and Rwanda. The United States called upon the rapporteur to focus on countries where extrajudicial, summary or arbitrary executions are major problems.<sup>19</sup>

### Non-State Actors

The Commission again cautiously examined the relationship between human rights and non-state actors. The annual Turkish resolution denouncing violations of human rights by terrorist groups was put to a vote for the second consecutive year; it was adopted by 33 to 0, with 20 abstentions.<sup>20</sup> Another roll-call vote of 37 to 0, with 16 abstentions, approved the appointment of Sub-Commission expert Kalliopi Koufa as a special rapporteur to carry out a study on human rights and terrorism.<sup>21</sup> Many governments again opposed these actions on the ground that human rights by definition are rights that people hold against governments only.<sup>22</sup>

Norway again had difficulty negotiating a resolution on minimum humanitarian principles, which would identify common rules of human rights law and international humanitarian law applicable in both peacetime and wartime. An analytical report of the Secretary-General, citing an earlier report of Sub-Commission expert Koufa, suggested the need to move "beyond the duty of States to respect and ensure the observance of human rights, and towards the creation of obligations applicable to private individuals and other non-State actors including liberation movements and terrorist organizations."<sup>23</sup> Many governments objected to this suggestion. The final text of the resolution asks only that the Secretary-General, in coordination with the International Committee

<sup>15</sup> At the 1997 session, the resolution was approved by a vote of 27 to 11, with 14 abstaining. See Dennis, 53d Session, *supra* note 4, at 113-14.

<sup>16</sup> UN Doc. E/CN.4/1998/156 and Add.1. While few other industrial democracies retain the death penalty, a majority of countries retain the death penalty for the most serious offenses. See UN Doc. E/CN.4/1998/82.

<sup>17</sup> His report is UN Doc. E/CN.4/1998/68/Add.3.

<sup>18</sup> Statement of Ambassador George E. Moose at 1 (Apr. 15, 1998) (on file with author).

<sup>19</sup> Statement of Ambassador George E. Moose at 1 (Apr. 21, 1998) (on file with author); CHR Res. 1998/68 (Apr. 21).

<sup>20</sup> CHR Res. 1998/47 (Apr. 17); see also Dennis, 53d Session, *supra* note 4, at 115.

<sup>21</sup> CHR Dec. 1998/107 (Apr. 17).

<sup>22</sup> See explanations of vote by the Governments of the United Kingdom (on behalf of the European Union), Canada, Japan, Mexico, Chile and the United States. CHR Press Release HR/CN/98/51 (Apr. 17, 1998). The Commission did adopt by consensus a Russian text on hostage taking that condemned hostage taking as an illegal act aimed at the destruction of human rights. CHR Res. 1998/73 (Apr. 22). Article 30 of the Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/816, at 71 (1948), expressly states that "[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

<sup>23</sup> Report of the Secretary-General, UN Doc. E/CN.4/1998/87, at 15-16.

of the Red Cross, continue to study and consult on the issues identified for further clarification and to submit a report to the fifty-fifth session.<sup>24</sup>

Several resolutions again called upon states to ensure respect for principles of humanitarian law as it relates to non-state actors. For example, the Commission adopted, by a vote of 24 to 1, with 27 abstentions, a Ugandan resolution that demanded "the immediate cessation of all abductions and attacks on all civilian populations, in particular women and children, in northern Uganda by the Lord's Resistance Army." The resolution also called upon "the Member States to undertake to respect and ensure respect for the rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child."<sup>25</sup>

#### IV. HUMAN RIGHTS MACHINERY—THEMATIC

The Commission continued to refine its elaborate set of mechanisms and procedures, thematic and country oriented, to monitor compliance by states with international human rights law and to investigate specific abuses through fact-finding missions. The Commission currently has twelve rapporteurs, two working groups, four independent experts and one special representative of the Secretary-General dedicated to specific themes.

##### *Civil and Political Rights*

In 1997 the Commission decided on three-year renewals of the mandates of the Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment; extrajudicial, summary or arbitrary executions; and religious intolerance.<sup>26</sup> The Commission also extended the life of the five-member Working Group on enforced or involuntary disappearances for an additional three-year period.<sup>27</sup>

##### *Economic, Social and Cultural Rights*

The Commission continued to expand its involvement in economic, social and cultural rights. The actions included (1) a Philippines text, adopted by a vote of 36 to 14, with 3 abstentions, calling for the continuation of the working group and independent expert on structural adjustments; (2) a Cuban resolution, adopted by a vote of 26 to 16, with 9 abstentions, calling for the appointment of a special rapporteur on the effects of the economic adjustment policies arising from foreign debt and the right to development; (3) a French text, adopted by a vote of 51 to 1, establishing an independent expert on human rights and extreme poverty with a mandate to draft the main points of a declaration on the subject; (4) a Portuguese text, adopted by a vote of 52 to 1, creating a special rapporteur on the right to education; and (5) an African text, adopted by a vote of 33 to 14, with 6 abstentions, renewing the mandate of a Special Rapporteur on toxic waste.<sup>28</sup>

The United States voted against each of these resolutions, in part because, while there are many UN agencies to deal with economic and social rights, the Commission alone is charged with protecting civil and political rights. The United States was also concerned about overwhelming the capacities of the UN Office of the High Commissioner for

<sup>24</sup> CHR Res. 1998/29 (Apr. 17).

<sup>25</sup> CHR Res. 1998/75 (Apr. 22).

<sup>26</sup> CHR Res. 1998/38 (Apr. 17), 1998/68, *supra* note 19, and 1998/18 (Apr. 9).

<sup>27</sup> CHR Res. 1998/40 (Apr. 17).

<sup>28</sup> CHR Dec. 1998/102 (Apr. 9), and CHR Res. 1998/24 (Apr. 17), 1998/25 (Apr. 17), 1998/33 (Apr. 17), and 1998/12 (Apr. 9), respectively.

Human Rights with new, unfunded mandates.<sup>29</sup> Mary Robinson, the High Commissioner, underscored the fears of the United States by noting in her concluding statement that, even though she welcomed a more balanced approach to economic, social, and cultural rights, "I am faced with the impossible task of meeting mounting demands with dwindling resources."<sup>30</sup>

The underlying premise of several of these mandates—that foreign debt and structural adjustment programs work against human rights—was also unacceptable to the United States and other developed countries, which felt that such formulations provide an excuse for authoritarian governments to continue to violate human rights.<sup>31</sup>

### *The Right to Development*

A resolution on the right to development was adopted by consensus, establishing a new working group to be assisted by an independent expert.<sup>32</sup> The right to development, however, remains ill-defined. Developing countries seek to focus on macroeconomic policies, globalization and trade protectionism,<sup>33</sup> while others, including the United States, focus on actions that governments need to take to allow citizens to exercise their human rights, including good governance and the rule of law.<sup>34</sup> The Office of the High Commissioner has suggested utilizing a "human rights" approach to development, which would introduce a normative basis that is obligatory, and that requires a legislative response at the state level.<sup>35</sup>

## V. COUNTRY-SPECIFIC MEASURES

At its 1998 session, the Commission took actions addressing the human rights situations in twenty-nine countries, including nineteen country-specific resolutions. In contrast to prior years, the majority of the public actions were taken by vote. There are now twelve special rapporteurs or representatives, together with three independent experts and one special representative of the Secretary-General, assigned to specific countries. The various actions are discussed below.

### *Country-specific Resolutions*

The Commission renewed the country mandates of eleven special rapporteurs or representatives, including the following six by vote: Democratic Republic of the Congo (23 to 7, with 18 abstentions); Nigeria (28 to 9, with 16 abstentions); Iraq (32 to 0, with 21 abstentions); Sudan (31 to 6, with 16 abstentions); the former Yugoslavia (41 to 0, with 12 abstentions); and the Islamic Republic of Iran (23 to 14, with 16 abstentions).<sup>36</sup>

<sup>29</sup> See explanation of vote by the United States concerning the resolution on foreign debt (Apr. 17, 1998) (cc file with author).

<sup>30</sup> Statement of Mary Robinson, *supra* note 11, at 3.

<sup>31</sup> See explanations of vote by the United States, *supra* note 29, and Japan on resolution on foreign debt, CHR Press Release HR/CN/98/50 (Apr. 17, 1998).

<sup>32</sup> CHR Res. 1998/72 (Apr. 22).

<sup>33</sup> See GA Res. 52/136 (Dec. 12, 1997) (adopted by a vote of 129 to 12 (U.S.), with 32 abstentions).

<sup>34</sup> See Statement of United States Ambassador George E. Moose on the right to development (Mar. 26, 1998) (cc file with author).

<sup>35</sup> Report of the High Commissioner, UN Doc. E/CN.4/1998/21, para. 26.

<sup>36</sup> CHR Res. 1993/61 (Apr. 21), 1998/64 (Apr. 21), 1998/65 (Apr. 21), 1998/67 (Apr. 21), 1998/79 (Apr. 22) and 1998/80 (Apr. 22), respectively.



Country mandates of special rapporteurs that were extended without a vote included those concerning the human rights situations in Myanmar (Burma), Rwanda, Afghanistan, Equatorial Guinea and Burundi.<sup>37</sup>

#### *Advisory Services*

In recent years the Commission has increasingly turned to advisory and technical assistance to overcome the obstacles to the full enjoyment of human rights. At its 1998 session, the Commission requested that the Secretary-General fund the activities of the Office of the High Commissioner in Cambodia, Haiti and Somalia.<sup>38</sup> The Commission concluded its consideration of the human rights situation in Guatemala after nineteen years.<sup>39</sup>

#### *Statements of the Chairman*

Chairman Selebi read negotiated statements concerning the human rights situations in Kosovo, calling upon the Federal Republic of Yugoslavia to agree to the establishment of an office of the High Commissioner in Priština; in Colombia, welcoming the renewal of the agreement with the Government of Colombia to extend the mandate of the permanent office of the High Commissioner for Human Rights in Bogotá; and in East Timor, welcoming progress toward concluding an agreement with the Government of Indonesia concerning a technical cooperation program.<sup>40</sup>

#### *Confidential Procedure*

The Commission examined the human rights situations in nine countries, in closed sessions following the Economic and Social Council's Resolution 1503 procedures. It decided to continue consideration of Chad (with a special representative), Gambia and Sierra Leone, and to discontinue consideration of Japan, Kyrgyzstan, Paraguay, Peru, Saudi Arabia and Yemen.<sup>41</sup>

### VI. SELECTIVITY

#### *China*

For the first time since 1991, no resolution concerning the human rights situation in China was introduced. Countries that have previously sponsored such resolutions, including the United States, decided not to do so this year because of China's decision to sign the International Covenant on Civil and Political Rights and the progress made on matters such as the release of prominent political prisoners and the visit to Chinese prisons of the UN Working Group on arbitrary detention.<sup>42</sup>

<sup>37</sup> CHR Res. 1998/63 (Apr. 21), 1998/69 (Apr. 21), 1998/70 (Apr. 21), 1998/71 (Apr. 21) and 1998/82 (Apr. 24), respectively.

<sup>38</sup> CHR Res. 1998/60 (Apr. 17), 1998/58 (Apr. 17) and 1998/59 (Apr. 17), respectively.

<sup>39</sup> CHR Res. 1998/22 (Apr. 14).

<sup>40</sup> The texts of the chairman's statements are in the Report, *supra* note 1, at 298–99, 293–98, and 359–60, respectively.

<sup>41</sup> Report, *supra* note 1, at 361.

<sup>42</sup> See *Annual U.N. Ritual Condemning China Loses U.S. Support*, N.Y. TIMES, Mar. 14, 1998, at A1; *U.S. Won't Seek Censure of China for Abuses*, WASH. POST, Mar. 14, 1998, at 1. China subsequently signed the Covenant on Civil and Political Rights, in October 1998. The annual resolution, first introduced in 1990 after the assault on unarmed protesters in Tiananmen Square, has never been adopted by the Commission. See Dennis, *53d Session*, *supra* note 4, at 122.

### Cuba

The defeat of the U.S.-sponsored resolution on Cuba (16 to 19, with 18 countries abstaining) came as a surprise, given Cuba's refusal to allow a visit by the special rapporteur.<sup>43</sup> The rapporteur reported that there had not been any changes in Cuba and that the Castro Government was continuing its practice of systematically and brutally repressing its domestic critics.<sup>44</sup> The negative vote appears to have been based on several factors, including the Pope's visit, broad opposition to the U.S. embargo and intense lobbying by the Cuban delegation.<sup>45</sup> Defeat of the resolution ends the mandate of the Commission's special rapporteur with respect to Cuba, as well as any automatic resolution against Cuba in the General Assembly.

### Israel

As in prior years, the Commission adopted five resolutions on Israel, all of which the United States opposed. The texts were essentially the same as in previous years. Israel remains the only country subjected to multiple resolutions, its own official agenda item and a special rapporteur with an open-ended mandate.<sup>46</sup>

## CONCLUSION

In 1947 the Commission met for the first time to draft the Universal Declaration of Human Rights "as a common standard of achievement for all people and all nations." Since the adoption of the Universal Declaration on December 10, 1948, the Commission has met every year to measure achievements against that standard. The Declaration has inspired numerous treaties and provided a model for domestic laws and practices that protect human rights. Many people now lead freer, safer, more dignified and more prosperous lives because of these advances.

Yet it is a sad fact, as evidenced by the voluminous reports of the special rapporteurs, that fifty years later massive violations of human rights can still be found in parts of the world. The challenge remains to bring the promise of the Universal Declaration—universal human rights universally respected—to everyone. Achieving this goal will demand much of the United States and all those who value human rights.

MICHAEL J. DENNIS\*

<sup>43</sup> Report, *supra* note 1, at 349–51.

<sup>44</sup> The report of Special Rapporteur Carl-Johan Groth of Sweden is UN Doc. E/CN.4/1998/69.

<sup>45</sup> See *Human Rights Body Snubs U.S. on Cuba*, INT'L HERALD TRIB., Apr. 22, 1998, at 1; *U.N. Panel Defeats U.S. Move to Censure Cuba on Human Rights*, N.Y. TIMES, Apr. 22, 1998, at A5.

<sup>46</sup> See Dennis, 53d Session, *supra* note 4, at 122–23. The annual Middle East resolutions critical of Israel were as follows: (1) a Syrian resolution on human rights in the occupied Syrian Golan Heights (CHR Res. 1998/2 (Mar. 27)), adopted by 33 to 1, with 19 abstentions; (2) an Egyptian resolution on human rights in the occupied territories, including Palestine (CHR Res. 1998/1 (Mar. 27)), adopted by 31 to 1, with 20 abstentions; (3) a Tunisian text on the situation in occupied Palestine (CHR Res. 1998/4 (Mar. 27)), adopted by 34 to 1, with 18 abstentions; (4) another Tunisian text (on behalf of the League of Arab States) on the situation of human rights in southern Lebanon and the western Bekaa (CHR Res. 1998/62 (Apr. 21)), adopted by 52 to 1; and (5) a European Union text on Israeli settlements in the occupied territories (CHR Res. 1998/3 (Mar. 27)), adopted by 51 to 1.

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## BOOK REVIEWS AND NOTES

EDITED BY RICHARD B. BILDER

*Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy.* By Steven R. Ratner and Jason S. Abrams. Oxford: Clarendon Press, 1997. Pp. xxxv, 360. Index. \$95.

International law has long grappled with the complexities of individual accountability for large-scale human rights violations. Fifty years after the proceedings before the Nuremberg and Tokyo Tribunals, the establishment of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda and the recent adoption of a statute for a permanent international criminal court (ICC) have thrust this once-obscure area of law into the forefront of scholarly research and debate. To these developments, one may add the burgeoning of truth commissions, as well as criminal and civil proceedings before national courts, all aimed at redressing past human rights abuses in countries as diverse as South Africa, Ethiopia, Guatemala and El Salvador.

Steven Ratner and Jason Abrams's book is a timely and highly valuable contribution to the emerging literature on the subject. The authors, who are from the University of Texas at Austin and the UN Office of Legal Affairs, respectively, have prepared an outstanding book that is concise and accessible to a broad audience, yet comprehensive and scholarly. Ratner and Abrams manage to elucidate complex and confusing doctrinal and jurisdictional issues, identify mechanisms for the implementation of relevant international norms and discuss the practical viability of those mechanisms. All of these issues and mechanisms are appropriately considered within the broader context of the international legal system.

The book is divided into three parts, which deal, respectively, with substantive law, mechanisms for accountability and the atrocities of the Khmer Rouge. It also includes comprehensive appendices that reproduce the most important relevant international documents. The substantive law section discusses individual accountability for human rights abuses in the context of the international legal system. The authors point out that the unprecedented hor-

rors of World War II constituted the single most important catalyst in the development of the relevant norms and that this produced four distinct, but interrelated, bodies of law bearing on such abuses—international human rights law, international humanitarian law, international criminal law and the domestic law of states. The authors focus their discussion of substantive law on, in order, genocide and the imperfections of codification, crimes against humanity and the inexactitude of custom, and war crimes and the limitations of accountability for acts in armed conflict. The book also addresses other abuses incurring individual responsibility under international law such as slavery, torture, racial discrimination and forced disappearances, as well as defenses and other barriers to establishing the criminal liability of persons accused of these offenses.

The section of the book that discusses mechanisms for accountability rightly, in my opinion, points to national tribunals as "the forum of first resort," and only secondarily to international criminal tribunals, such as those that were established for the former Yugoslavia and Rwanda, which the authors call "the progeny of Nuremberg" (p. 162). In fact, despite the jurisdictional primacy of the international Tribunals for Yugoslavia and Rwanda, their Statutes provide that national courts enjoy concurrent jurisdiction in the prosecution of relevant crimes. The division of labor with national courts under the ICC statute's "complementarity" scheme goes even further. The exercise of jurisdiction by the ICC is justified only where states are "unable" or "unwilling" to genuinely prosecute the crimes themselves. Other mechanisms identified and explored in the book include non-prosecutorial options such as investigatory commissions, civil suits and immigration measures. The authors further discuss evidentiary issues and the need for judicial assistance through international cooperation.

The application of the substantive law and mechanisms for accountability to the Khmer Rouge atrocities in Cambodia during 1975–1979, which is discussed in the third part of the book, provides an illuminating case

study. The analysis illustrates the legal and political complexities of bringing to justice those responsible for one of the most egregious examples of mass killing in this century. Indeed, as the authors point out, this book emerged from a study on the legal options for bringing Eimer Rouge officials to justice that was requested by the U.S. Department of State in 1994.

Considering the comprehensiveness of this book, the almost complete omission of any reference to the so-called Hague law, which contains humanitarian rules relating to the means and methods of war, is rather curious. Perhaps the authors paid little attention to this area of law because it was not directly relevant to their initial efforts to study the crimes of the Khmer Rouge. The means and methods of warfare, however, are unquestionably the most complex, ambiguous and controversial area of international humanitarian law. The book would have benefited from more focus on this area of the law.

The 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* by the International Court of Justice<sup>1</sup> exemplifies the contradictions inherent in reconciling fundamental principles of humanitarian law (i.e., the distinction between civilian and military targets and proportionality in the use of force) with the arrogation by some states of the exclusive right to deploy the ultimate weapons of mass destruction. Due to ambiguities and loopholes in the Hague law, military necessity has often prevailed over humanitarian considerations. As a consequence, the laws of war sometimes serve as a means of legitimizing violence and sanitizing its terrible consequences for civilians and combatants alike. Concern as to how these legal ambiguities might be resolved by judicial interpretation may explain the reluctance of some states to accept the jurisdiction of the international criminal court. For example, military planners of powerful states may fear that the ICC's interpretation of what constitutes legitimate targets or proportionality in the context of large-scale aerial bombardment may unduly constrain their scope of action. Thus, the indeterminacy of the substantive law also influences and shapes the available range of accountability mechanisms. These are but some examples of the far-reaching doctrinal and systemic issues

that a treatment of the Hague law would have contributed to the book.

The book would also have benefited from a more comprehensive treatment of the complex issue of individual criminal liability. In view of the dearth of relevant international jurisprudence since the Nuremberg and Tokyo trials, there are significant normative gaps in this area of international criminal law. Although the substantive crimes have been defined in international instruments—e.g., the 1907 Hague Convention, the 1945 Charter of the International Military Tribunal at Nuremberg, the 1948 Genocide Convention, the 1949 Geneva Conventions and 1977 Additional Protocols thereto—or through customary law, the attribution of criminal liability has been essentially a matter for domestic legal systems. Thus, as the emerging jurisprudence of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) demonstrates, resort to “general principles of law” recognized by nations is an important means of remedying the gaps in conventional and customary law. But legal systems, for example, the common law and civil law traditions, often adopt different approaches to basic criminal law concepts such as the constituent elements of criminal conduct (e.g., *mens rea* and *actus reus*) and the range of available defenses. The various forms of participation in criminal activity such as planning, instigating, ordering, or aiding and abetting, and more complex doctrines such as conspiracy and command responsibility, point to particularly complex differences between and within the common law and civil law systems.

The desire for a coherent and consistent jurisprudence, and especially the principle *nullem crimen sine lege*, requires greater certainty in this area of international criminal law. Although a comparative approach is vital, it does not always successfully reconcile the inconsistencies between various legal systems. An outstanding example of this problem is the *Erdemović case*—the first full proceeding before the ICTY appeals chamber—in which the issue of duress as a defense to murder was considered.<sup>2</sup> Duress is available as a defense to murder in civil law systems but not in most common law systems. In a sharply divided 3-2 opinion, the majority of the appeals chamber resolved the issue in favor of the common law

<sup>1</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ REP. 226 (July 8).

<sup>2</sup> *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Appeals Judgment (Oct. 7, 1997).

position by reference to moral and policy considerations, much to the dissatisfaction of then-President Antonio Cassese who wrote a vigorous dissent.<sup>3</sup> Thus, general principles may be of limited value in filling gaps in the law, requiring the development of a unique international law jurisprudence for this area. The enumeration of the general principles of criminal law in the ICC statute will alleviate, but not avoid, such problems of judicial interpretation or interstitial "legislation." Since this area of international law is in its infancy, the ambiguities and predicaments inherent in defining the basis for individual criminal liability in international law are sure to be revisited by both courts and commentators as a genuinely international jurisprudence suited to the unique context of international crimes is developed.

In their conclusion, the authors acknowledge that the "responsibility" to pursue justice "follows from moral, political, and . . . legal considerations" (p. 295). Consequently, they place the concept of accountability in a broader context. The failure to address the crimes of the past, they observe, "leaves open the wounds in a society," denying a moral "right to know the details regarding the perpetrators, victims, and circumstances of atrocities" (*id.*). Accountability also helps "build a culture of respect for human rights," underscoring the political perils of embracing ideologies founded on hatred (*id.*). In addition to the societies directly affected, "accountability serves goals for the international community as a whole" because "[i]t can signal to future violators of human rights that their actions will not simply be forgotten in some political compromise" (pp. 295-96), thereby serving a preventive or deterrent function. Lastly, the authors point out that "international law imposes duties on states to address various atrocities—duties that have arisen from the very moral and political concerns" (p. 296) that they address.

These considerations give rise to a range of complex and perplexing issues upon which the effectiveness of accountability ultimately rests. How do traditional concepts of criminal justice translate into the context of widespread and systematic crimes? How should retribution be

understood where a significant proportion of the population is implicated in criminal conduct (for example, there are currently 130,000 accused *génocidaires* in Rwandan prisons awaiting trials) and where the prospect of punishing any but a limited number of perpetrators is unrealistic? How should retribution be balanced with the equally legitimate objective of reconciliation in a traumatized society struggling to build a better future? Is it reasonable to expect criminal punishment to achieve deterrence or prevent the recurrence of future large-scale crimes? How are different accountability mechanisms suited to "truth telling" and does exposure to such a narrative have any appreciable influence on social behavior?

The magnitude and heinousness of genocide and other large-scale crimes against humanity give rise to profound questions about the potential and limits of the rule of law as an expedient and all-encompassing remedy for such "radical evil." Reducing the indescribable horrors of Bosnia-Herzegovina and Rwanda to the antiseptic confines of judicial proceedings is not without its drawbacks. The "legalization" of the discourse on international crimes risks trivializing the immense suffering that occurs, especially if the broader context of the human experience is ignored. There is also a fine line between achieving justice and engaging in rituals of self-appeasement, especially where the international community was a spectator to a "preventable" genocide, as many believe was the case in Rwanda where relatively low-cost intervention might very well have saved numerous lives.

This excellent book provides a thoroughly researched and eloquently written survey of the legal and policy framework within which these and other complex issues may be examined. It combines scholarly erudition with a practical sense and thus provides a valuable instrument for the pursuit of international justice. It is indispensable reading for students, practitioners, scholars and others interested in accountability for gross human rights abuses.

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<sup>3</sup> See *id.* at 28-76 (McDonald and Vohrah, JJ., joint sep. op.), and 13-55 (Cassese, J., sep. and dissenting op.).

\*The views expressed herein are those of the reviewer and do not necessarily reflect the views of the United Nations.

*Czechoslovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup.* By Eric Stein. Ann Arbor: The University of Michigan Press, 1997. Pp. xxiii, 386. Index. \$57.50; £42.50.

The last decade of the twentieth century has witnessed the breakup of three well-established nation-states in Europe—the Soviet Union, Yugoslavia and Czechoslovakia. The common cause of these disintegrations was the failure of the ruling elites to persuade the multinational societies living within the common state to continue their commitment to unity in the new political environment after the fall of communism. In geopolitical terms, the event that triggered the process of disintegration was the admission by Mikhail Gorbachev's Soviet Union that it could no longer sustain the power structure maintained during the Cold War and that the concept of hegemony had to yield to universal democratic values, which included freedom and self-determination.

Yet the circumstances under which the three nation-states disintegrated differed widely. The Soviet Union fell apart as a result of internal implosion. Yugoslavia went to wrack and ruin as a result of a combination of national and religious schisms and incompetent international interventions. The breakup of Czechoslovakia stands apart in that it occurred voluntarily and without affecting peace and stability in the region.

Professor Eric Stein, a distinguished American scholar with a Czech background, has undertaken the task of analyzing the events that led to the dissolution of a union that had lasted from the end of World War I through the Communist era. (It should be remembered that the Czechs and the Slovaks entered a voluntary union in 1918 when Thomas G. Masaryk, who later became the first president of the Czechoslovak Republic, mediated the Pittsburgh Agreement on the establishment of a common Czech and Slovak state.<sup>1</sup>) Professor Stein's special qualifications include his membership in an advisory group set up by the New York-based Carter 77 Foundation in 1990 to assist post-Communist Czechoslovakia in building its new constitutionalism. As a member of this group, Professor Stein participated in the deliberations concerning the draft constitution of the post-Cold War Czechoslovak Republic, and he

closely followed the subsequent developments that resulted in the split of Czechoslovakia into two separate states, the Czech Republic and the Slovak Republic.

His analysis begins with some thoughts on nationalism and ethnic conflict. As a working proposition, he seems to accept the view of American sociologist Donald L. Horowitz that the source of contemporary ethnic conflicts is "cultural differences" and "ignorance or realistic divergence of interests" (p. 2). He then asks the question whether an ethnic conflict can be bridged by constitution writing.

The answer is provided by his meticulous account of the negotiations that began in 1990 as discussions on the constitutional setup for post-Communist Czechoslovakia and culminated in the 1992 agreement between the Czechs and the Slovaks to separate. In 1990, another member of the international advisory group, former Canadian Prime Minister Pierre Trudeau, had posed a threshold question to the Czechs and Slovaks: "Do you want a state composed of one nation or two?" (p. 47). At the time, the proposition received short shrift because the international group, with the Americans at the forefront, pleaded for a strong federation.

Most Czechs and Slovaks did not relinquish allegiance to a common state lightly. Before it became apparent that a split could not be avoided, every attempt had been made to save the union. Serious constitutional negotiations, conducted at various levels of government and supported by a wide political spectrum, centered on the search for a type of federation that would accommodate both the Slovak aspiration for national sovereignty and the Czech insistence on a functional union. One proposed solution was a treaty model, under which the two republics would conclude a "state treaty" allocating powers between the center and the republics. The treaty would then be followed by the conclusion of a federal constitution. However, the members of the international advisory group advised against this model. Professor Laurence H. Tribe, drawing a lesson from American history, said that the 1787 U.S. Constitution "owes its endurance in significant part to its quite explicit rejection of the treaty model as a basis for federation" (p. 106). A similar view was taken by the French member of the advisory group, State Counselor Roger Errera, who argued that the Czechoslovak state had existed since 1918 and that "[t]o introduce now the

<sup>1</sup> See JOZEF LETTRICH, *HISTORY OF MODERN SLOVAKIA* 299 (1955).

idea of such a treaty amounts to pretending that nothing exists at all, except the two Republics, that the future Federation will come into existence as a product of the treaty and that the Republics do indeed have jurisdiction (primary or derived) to sign such an instrument" (p. 107). This view was echoed by some Czechoslovak constitutional and international scholars who insisted that it was impossible for members of a federation to conclude a federal treaty while their federation already existed as a sovereign entity.

Professor Stein gives a detailed account of every phase of the long and frustrating negotiations and he does so in an unbiased way without trying to assign responsibility for frequent turnabouts and deadlocks. His assessment of the role played by President Václav Havel is fair. Although the President brought the separation alternative into public discourse by stating, early in the debate, that it would be "better to have separate republics than a non-functional federation" (p. 108), he did everything in his power to prevent this from happening. As Professor Stein shows, and as history will no doubt evidence, Havel's commitment to the cause of Czechoslovak unity was total and unreserved. He spared no effort to encourage negotiations and to supply fresh ideas when the parties lacked initiatives. In November 1991, he circulated a proposal for the structure of a Czech-Slovak agreement with specific steps and deadlines for approval. He suggested that the agreement be concluded by the regional parliaments on behalf of the republics and have the status of a legal instrument under domestic law. In subsequent proposals, he sought ratification of a new federal constitution by the regional parliaments and called for a modification of the law on referendums to enable a sizable group of citizens in both republics to demand a referendum on the question of leaving the federation. When, in July 1992, Havel resigned from the federal presidency because of Slovak opposition to his reelection (p. 209), his intermediary activity came to an end. (After the split, he was elected president of the Czech Republic.)

Quite appropriately, Professor Stein compares the agonies of Havel and Lincoln:

Could Havel have done more—and could he still do more to sustain the "union?" Lincoln acted from a powerful political base established by his party's victory in the national elections of 1860. Havel's great influence was reduced by a series of failed initiatives and missteps in Slovakia, and it

was gravely impaired by the last election, which had swept most of his ardent supporters from the political scene. Lincoln seized on a compelling idea, the necessity to salvage the novel American experiment in governance. . . . A lawyer and experienced politician, he employed this theme, buttressed subsequently by the call for the abolition of slavery, with consummate skill. Havel, with no experience in politics, had no program of comparable potency, no nationally based party. (P. 192)

The elections Professor Stein refers to were held in June 1992. In the Czech lands, the right-of-center Civic Democratic Party led by Václav Klaus was the victor; in Slovakia, the elections brought to power Vladimir Mečiar's Movement for a Democratic Slovakia allied with the left-wing and extreme nationalist parties. Klaus in Prague and Mečiar in Bratislava formed the respective regional governments. It was their decision whether or not to cross the Rubicon. Immediately after the elections, however, it became clear that the constitutional crisis showed no signs of abating, and the chance to preserve Czechoslovak statehood greatly diminished after the Slovak parliament adopted, on July 17, 1992, a Slovak Declaration of Sovereignty. As prime ministers of their respective constituent republics, Klaus and Mečiar engaged in a series of talks in late July that culminated in an agreement that the Czechoslovak federation should split up and that the two sovereign successor states, the Czech Republic and the Slovak Republic, should enter into a number of bilateral agreements delineating the areas of their mutual cooperation. Amazingly, the arrangement was accepted without protest by the public, which had not been consulted despite the fact that proposals to organize a national referendum had been on the table.

The political compact contemplating the split was transformed into a legal arrangement by the Constitutional Law on the Dissolution of the Czech and Slovak Federal Republic, adopted by the Federal Assembly on November 25, 1992, shortly before the federal parliament was dissolved (p. 268). The law tersely states that, at midnight on December 31, 1992, Czechoslovakia shall cease to exist and that the authority vested in it by constitutional and other laws shall be transferred to the Czech Republic and the Slovak Republic. (In some ways, this law is reminiscent of the Minsk Agreement on the Creation of the Commonwealth of

Independent States of December 8, 1991 which declared that the Union of Soviet Socialist Republics had "ceased to exist as a subject of international law and a geopolitical reality" and recognized the sovereignty of its former constituent republics.<sup>2)</sup> Another law divided Czechoslovak property between the two republics along the following lines: (1) real property was to be transferred to the ownership of the republic where it was located, and (2) all other property was to be allocated to the Czech Republic and the Slovak Republic in the proportion 2:1. The same proportion was used to divide extant liabilities. Two dozen treaties and agreements between the republics complement the web of legal relationships that were created to fill the gaps left when the federal legislation was terminated.

The "peaceful divorce," as the split of Czechoslovakia into two independent states is sometimes called, was achieved without an outburst of violence and with a minimum of acrimony. It transpired strictly within the legal arrangements established by the two states and spared the international community much concern and anxiety. The international aspects of the split were carefully managed. The old Czechoslovakia was declared extinct and the two republics entered the international scene as new states. Neither claimed exclusive succession to the rights of the former Czechoslovakia. For example, both renounced any claim to continue the membership held by Czechoslovakia in the United Nations. Each thus applied for admission as a new member and both were accordingly admitted as such in 1993. As the reader will recall, Czechoslovakia was a founding member of the United Nations, a status that held considerable prestige. The fact that neither the Czech Republic nor Slovakia claimed this status, to the exclusion of the other, attests to their mutual commitment to equality and strict symmetry in dealing with the international dimension of their divorce. As Professor Stein observes, "neither side made a serious effort to force the other into a position of unilateral succession" (p. 311). Many foreign diplomats accredited to the Czechoslovak Government in Prague were surprised when, in January 1993, the Czech Ministry of Foreign Affairs asked them to convey to their governments a request for recognition of the Czech Republic; they had assumed

that their accreditation would continue without a formal act of recognition.

Similarly, the issue of succession to the treaties of the Czechoslovak Republic was resolved in accordance with international law and without requiring intercession by the international community. The Czech Republic and Slovakia agreed that all treaties linked exclusively with the territory of a successor republic will be inherited by that republic. Thus, the Czechoslovak Treaty with Hungary on the construction of the Gabčíkovo-Nagymaros dam was assigned to Slovakia as a treaty establishing a territorial regime within the meaning of Article 12 of the 1978 Vienna Convention on Succession of States in Respect of Treaties. Consequently, the dispute that subsequently arose and led to litigation before the International Court of Justice became a dispute between Slovakia and Hungary. The Czech Republic, thus, took no part in the proceedings. Both republics succeeded to all other treaties, and it was the sole responsibility of each of them individually to negotiate with the other contracting party or parties on the question of whether or not the treaty should remain in force for the republic.

Professor Stein wonders why the Czecho-Slovak outcome was so different from the situation in the former Yugoslavia and the Soviet Union. Perhaps the answer lies in history and geography. Historically, the Czechs and Slovaks had never fought a war against each other. Most importantly, more than seventy years of coexistence within a common state had made the Czechs and Slovaks much alike, and the divergence of their interests never reached the level of intensity that characterized the situation in Yugoslavia or the Soviet Union. They may have temporarily succumbed to the temptation of nationalism that has swept Eastern Europe after the fall of communism. But one hopes that they will join again as partners in the process of European integration, which will obviate the differences that caused the end of Czechoslovak statehood.

Professor Stein's book is a major achievement. It is the first comprehensive account of the Czecho-Slovak split, and it raises important questions about issues of constitutional and international law that arise in conjunction with this historic event.

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<sup>2</sup> 31 ILM 138 (1992).





*Ethics and Authority in International Law.* By Alfred P. Rubin. Cambridge, New York, Melbourne: Cambridge University Press, 1997. Pp. xxvi, 214. Index. \$59.95.

In his Hague Academy lectures of 1937, Hersch Lauterpacht stated: "The question of the relation of international law to municipal law raises not one but several issues which lead us into the very heart of the nature of international law."<sup>1</sup> Professor Rubin's monograph acutely explores this terrain, expounding a thesis at odds with Lauterpacht's monist concept of international law.<sup>2</sup> Starting from a substantive analysis of universal criminal jurisdiction, Rubin presents a sustained argument against the "conventional wisdom" that he claims dangerously distorts our understanding of the international legal order.

Rubin, a professor at the Fletcher School of Law and Diplomacy, presents a detailed historical analysis of domestic responses to piracy and states' attempts to prohibit the international slave trade during the eighteenth and early nineteenth centuries. This analysis is employed for a dual purpose. Substantively, Rubin presents an argument skeptical of pretensions to universal jurisdiction. He then proceeds to attack what he sees as the dominant conceptual understanding of the international legal order, which underpins these claims. He argues that the current conventional wisdom is seriously confused, which arises from false fundamental jurisprudential assumptions: "The 'ontology,' intellectual 'models' of the world order, in the minds of those addressing the questions [seem] to reflect aspects of culture and definitions of 'law' . . . unrelated to the realities of 'authority,' its real distribution in the world, and predictable and demonstrable state practice" (p. xii). Rubin argues that this conceptual misapprehension has a deleterious effect on the operation of international law because it generates false expectations of the role and efficacy of the international legal order.

Rubin argues that the false "conventional wisdom" that perverts our understanding of the international legal order lies in the acceptance

of natural law, which too easily assimilates moral prescriptions to substantive law. In particular, he focuses on the assumption, which he alleges is mistaken, that universal crimes have as their inevitable corollary universal jurisdiction to prosecute. Taking "a long-range historical approach to the evolution of doctrine and its relation to reality" (p. xv), Rubin concludes that claims to universal jurisdiction do not reflect state practice or the distribution of authority within the international legal order. Nevertheless, he argues that the contrary view is maintained by most influential contemporary international lawyers.

Rubin traces this reception of natural law in doctrine to the Roman law concept of the *jus gentium*, the view that universal moral precepts exist to which all law should conform. The naturalist identification of law with moral values "assumes that reasonable people agree on all essential questions of morality and order. But very few products of human lawmaking effort are adopted through a legislative procedure by unanimous vote or equal enthusiasm in any consensus" (p. 187). Rather, Rubin sees law as a contingent social institution, "an aspect of social perception, reflecting morality, political values and traditions that vary with time and in place" (p. 204). Consequently, the adoption of law is an act of human choice and so Rubin argues in favor of the *jus inter gentes*, the positivist notion of international order that allocates authority and, thus, lawmaking capacity to states. By his emphasis on discretionary consent and authority, the latter an element too frequently ignored in modern theories of international law, Rubin denies claims that moral imperatives are ipso facto substantive legal rules.

Rubin's specific illustration is that assertions of universal jurisdiction to determine individual criminal responsibility are based on the flawed conceptual model of naturalism. This starts from an analysis of piracy trials held in the eighteenth and early nineteenth centuries. He concludes that these trials did not proceed on the basis of universal jurisdiction bestowed by the naturalist *jus gentium* but, rather, as the result of domestic legislation whose implementation was circumscribed by the legitimate interests of other states. This was a rejection of the *jus gentium* conception that "rules of substantive law common in many parallel systems were . . . parochial reflections of some underlying general principles of law binding on all directly" (p. 191). These trials instead repre-

<sup>1</sup> These lectures, originally published in French in 62 RECUEIL DES COURS 99 (1937), may be found in English in 1 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 179, 216 (Elihu Lauterpacht ed., 1970).

<sup>2</sup> For analyses of Lauterpacht's views, see 8 EUR. J. INT'L L. 215 (1997).

serted a conceptual shift to the dualist and positivist *jus inter gentes* which emphasizes sovereign equality—a fundamental corollary of positivism but inimical to natural law theories—and the concurrent existence of domestic legal orders to which jurisdiction is allocated. Accordingly, states could not enact or enforce prescriptions on other states without their consent. Indeed, Rubin argues that the inadequacy of *jus gentium* theory in practice was demonstrated by its failure to criminalize the international trade in slaves. This required positivist state consent and marked the rejection of

the fundamental naturalism that statesmen in practice found unrealistic, or at least uncongenial to the degree that it gives legislative authority to scholars . . . who have no real responsibilities, and takes it from statesmen whose discretion is tempered by the needs of their constituents and their perceptions of the needs of the state far more than by the moral assertions of others. (Pp. 61–62)

Rubin sees the contemporary influence of naturalism manifested in the creation of tribunals, such as the International Criminal Tribunal for the former Yugoslavia, and the international criminal court. The creation of the former he sees as an attempt to argue that an

agreement on substance, that war crimes or genocide themselves constitute atrocities that should be punished, presupposes the existence of an enforcement mechanism based on international supervision which is simply not supported by the facts or assumptions of a dualist, positivist legal order reflected in the actual text of the [Geneva] Conventions. (P. 157)

Rubin's point is that a dualist remedy exists for offenses of this nature in domestic legislation enacted in fulfillment of treaty obligations. The creation of an international tribunal is, thus, an attempt to displace the *jus inter gentes* in pursuit of a monist-naturalist view of world order that circumvents domestic remedies.

The focus on naturalism in this context raises two points. First, Rubin correctly identifies Lauterpacht's *Private Law Sources and Analogies of International Law* (1927) as a naturalist attempt to revive the *jus gentium*. However, he perhaps does not fully grasp the significance of Lauterpacht's attachment to monism in which the individual is a key issue. For Lauterpacht, monism entails that individuals are the ultimate subjects of international law. This provides an alternative to Rubin's argument that the ascription

of individual criminal responsibility by international tribunals is merely an emanation of moral imperatives misconceived as law. One may wonder how far Lauterpacht's doctrinal position influenced the imposition of individual criminal responsibility in the aftermath of World War II. This question is speculative, as the unanswered question is the extent of Lauterpacht's role in the Nuremberg war crimes process. Various sources attest to his role in the drafting of the speeches of Lord Shawcross, the chief British prosecutor at Nuremberg, but Lauterpacht is also reputed to have been responsible for the drafting of Article 6 of the London Charter.<sup>3</sup>

Second, there is perhaps another reason for the international punishment of war crimes that is independent of naturalist theories. This is the desire for a public restoration of order<sup>4</sup> and a reassertion of the authority of the international community. Rubin notes that, when faced with atrocities, the international system frequently does nothing except to limit these atrocities to the territory in question and encourage the escape of potential victims (pp. 183–84). Yet he also claims that "the state that ignores moral obligations does not establish a viable order" (p. 186). Trials held under international auspices can be seen as an attempt to ensure the maintenance of the distribution of established authority—and thus established order—within the international community, which might otherwise be threatened by the internal collapse of order within a state. This aim need not have a moral basis, but can simply be as self-serving as the Holy Alliance's claim to prohibit revolution within states in order to maintain its own authority (p. 117).

Nevertheless, Rubin argues that the creation of the Yugoslav Tribunal was inconsistent with the actual distribution of global authority, which "makes it certain that the tribunal will fail to achieve its stated purposes" (p. xiii). His objection is that

the problem is not with using the forms of law to expose the horrors of an unspeakable episode in human history, but with attempting to use those forms to justify

<sup>3</sup> Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 8 EUR. J. INT'L L. 215, 244 (1997).

<sup>4</sup> This idea was influenced by E. P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* (reprint 1987) (1906).

redistributing authority in the international legal order without considering the full range of consequences: Precisely *who* should have the authority to order *whom* to justify his or her acts before *whom*, and *who* selects the judges, the "guardians"? (P. 183)

Rubin recognizes that international tribunals have efficiently resolved disputes, but stresses that their authority has been based exclusively on consensual jurisdiction. He comments, moreover, that "[t]he aim of such arbitrations is only secondarily 'justice.' It is primarily to end the dispute" (p. 157). Further, although Rubin's monograph was published well before the recent adoption of the Rome Statute of the International Criminal Court, it is striking how prescient some of his comments have proved to be. For instance, "the 'solution' of requiring by international law that states exercise their jurisdiction to adjudicate in ways the community finds satisfying must fail until the great powers themselves are willing to submit voluntarily to the sort of community supervision that many advocate for others" (p. 198).

Rubin's fundamentally skeptical agenda shares much with contemporary theories of international law, for instance, some scholars associated with the New Stream or New Approaches to International Law schools of thought, although these scholars' skepticism is perhaps intellectually driven, taking its cue from, for instance, the philosophical writings of Jacques Derrida and so, ultimately, from David Hume. Rubin's skepticism derives from his belief that international law commentators' conventional wisdom is simply wrong: because it does not accurately reflect the structure of international law by paying scant regard to the actual location of authority in international society. Rubin is adamant that authority lies with states, not commentators, and censures the "distance between assertions of 'law' by jurists, and the practices accepted as lawful by statesmen" (p. xii).

It is perhaps to be regretted that Rubin does not mention, far less engage, contemporary theoretical schools of thought. It would have been interesting to hear his opinion on the arguments of such contemporary theorists as Carty or Koskeniemi who build their theses through the critical analysis of the conceptual structure of international law contained in the writings of publicists. Rubin would no doubt take a dim view of this approach and argue that it is a fundamental mistake to confuse doctrine with law, as authority lies with states and not in the

opinions of publicists, however learned. As he affirms, quoting Baty (*The canons of international law*, 1930) with relish: "It is universally agreed that, in spite of modern theories . . . International Law . . . nevertheless has something to do with States" (p. 155).

This failure to address contemporary theory is merely noted as an observation. Rubin's concern is not with current jurisprudential affairs as such, but rather with the historical evolution and evaluation of established doctrinal conceptions of international law. As he states:

it is not the function of this study to pick quarrels with advocates for any particular model of the current legal order. Rather it has been the aim to expose the intellectual origins of the current international legal order in operation and its evolution into a frankly positivist and dualist system. (P. 136)

To criticize Rubin for ignoring some contemporary theories would, accordingly, be misplaced and evince an agenda other than that of the author.

This is not an easy book. As the substance of the argument challenges much accepted doctrine, I found myself constantly questioning the text. Moreover, at times Rubin demonstrates a predilection for sentences of almost Proustian complexity. It is a book that demands active engagement by the reader. The reinstatement of authority as a central concern is valuable, representing a Benthamite turn in contemporary theory of international law by insisting that a clear distinction should be drawn between law as it is and law as it ought to be, thus "differentiating moral indignation from legal argumentation" (p. 20). Although Rubin overstates his thesis, this may be no bad thing as overstatement can throw a point into relief and stimulate its reconsideration. That is precisely Rubin's aim—to reassess the conventional wisdom and residual inarticulate naturalism of the invisible academy of international lawyers.

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*Recognition of Governments in International Law: With Particular Reference to Governments in Exile.*  
By Stefan Talmon. Oxford, New York: Clarendon Press, 1998. Pp. lxxii, 373. Index. \$95.

This monograph is based on a doctoral thesis prepared by the author, a German Rhodes

Scholar, under the supervision of Professor Ian Brownlie at Oxford University.

The reviewer approached this book with some skepticism. In the past two decades, many states have declared they would abandon the practice of recognizing governments in order to avoid accusations of demonstrating approval or otherwise of particular new regimes. By 1994, not only all European Union member states, but also Canada and Australia and many other countries, had adopted the policy of recognizing only states, not governments. This policy was first enunciated in 1930 by Mexico in the so-called Estrada doctrine on the grounds that the practice of recognizing governments was insulting and offended the sovereignty of nations and that abandoning the practice would avoid confusion between the political and legal aspects of recognition. I wondered whether a new study of this subject would be of much practical use and, indeed, what more could be said about it. My initial skepticism was reinforced by Talmon's emphasis on the legal status of authorities in exile claiming to be governments since I assumed his study would concentrate on the long-gone governments-in-exile in London during World War II. However, my doubts were soon replaced by admiration for this study, in which Talmon comprehensively analyzes both the relevant diplomatic practice of states and the decisions of national and international courts. Further, he discusses not only situations of historical importance, but also those of current interest such as recent practice pertaining to Afghanistan, Angola, Cambodia, Chad, Haiti, Kuwait, Panama and the Palestine Liberation Organization.

The book is well organized, comprising a general introduction and two main parts. The first part explores the various meanings of recognition of governments in international law. The second part examines the legal status of authorities in exile that are recognized as governments. These two main parts are followed by three appendices containing (1) replies received from thirteen states in response to a questionnaire on the recognition of governments sent by the author to 158 diplomatic and consular missions accredited to the United Kingdom, (2) short profiles of seventy authorities in exile claiming to be governments from 1914 to 1995, and (3) a twenty-two page list of treaties concluded by authorities in exile recognized as governments. The book also includes extensive footnotes, a lengthy bibliography, an

index and, finally, tables of the international and national cases and national legislation referred to in the study.

In part 1, Talmon discusses the various types and the meanings of recognition of governments, such as *de jure*, *de facto* and diplomatic recognition, as well as the consequences of recognition on the legal status of governments. He concludes that recognition "may indicate the recognizing State's willingness to enter into certain relations and/or express its opinion on the legal status of the authority recognized" (p. 269). This depends solely on the recognizing state's intention, which can be conveyed either by a formal statement (express recognition) or by other actions that communicate the essential ingredient of willingness or opinion (tacit recognition). Such major "other actions" might, for example, include the conclusion of a bilateral treaty or the appointment and acceptance of diplomatic and consular agents. Talmon contends that states that no longer make formal announcements of recognition have merely "abandoned one mode of recognition but have not (and could not) abolish [*sic*] the institution of recognition of governments in international law" (p. 269). Consequently, he concludes that the significance of recognition cannot be diminished by simply announcing that henceforth a state will recognize only states and not governments. He acknowledges, however, that the result of the debate on theories of recognition depends on the factual and legal circumstances of each case as it relates to the meanings of recognition—whether *de jure*, *de facto*, diplomatic, formal or official—and to the subsequent effect on the legal status of governments.

In part 2, which constitutes well over half the book, the author examines the effect of recognition on the legal status of governments by contrasting the legal status of authorities in exile that are recognized as governments with the status of those authorities in exile that are not so recognized (and thus have lesser capacity). This analysis illustrates very clearly the importance of recognition on both the international and the national planes. Talmon's detailed examination of state practice demonstrates that recognition is a legal act that produces legal effects that courts and practitioners must take into account. Talmon also thoroughly discusses in this part some of the legal consequences of recognition, including treaty-making competence, status of diplomatic agents, judicial proceedings, access to state property abroad, freez-

ing of foreign assets, succession to property abroad, protection of nationals, legislative and enforcement jurisdiction, privileges and immunities, actions *in personam* and *in rem* and against third parties, and many other important issues. Talmon's analysis indicates that the legal effects of recognition of governments-in-exile are limited, for the most part, to effects within the jurisdiction of the recognizing state. He contends that, except as regards their legislative authority inside national territory, recognized governments-in-exile have the same representative and jurisdictional competence and enjoy the same privileges and immunities in foreign states as if they were residing in their state's capital (p. 272). Talmon's study of many historical examples illustrates that authorities in exile, although often not exercising effective control over territory, are enabled through recognition by their host states to perform most of the legal functions of a government.

Talmon points out that, although recognition is a legal or juridical act, in certain circumstances it can also be an illegal act. For example, the recognition as a government of an authority in exile that does not really qualify as such under the accepted criteria of international law may be both a political and a juridical act and an international delict. In such an instance, states may maintain relations with and accord diplomatic privileges and immunities to an authority in exile, but that may also be regarded as an unfriendly act toward the state and government that the authority in exile claims to represent. Furthermore, Talmon suggests that, if in such a case the recognizing state were to hand over to the authority in exile the state's assets in the recognizing state, that would constitute an international delict involving the responsibility of the recognizing state because the authority in exile did not in fact meet the criteria of a government under international law.

More broadly, the author thoroughly discusses the rights and duties of recognized governments-in-exile as contrasted to the lack of rights and duties of authorities in exile that are not recognized as governments. While the analysis is exhaustive, it is not tedious. Moreover, the book is generally well written.

This book not only should be of great interest to international law academics, but also could prove useful to both governmental and nongov-

ernmental practitioners. It is undoubtedly the leading treatise available on the recognition of governments-in-exile.

EDWARD G. LEE, Q.C.  
Ottawa

*FDR and the Creation of the U.N.* By Townsend Hoopes and Douglas Brinkley. New Haven, London: Yale University Press, 1997. Pp. xii, 277. Index. \$32.

Historians Townsend Hoopes and Douglas Brinkley have produced a highly readable and handsomely illustrated retelling of the founding of the United Nations. In the preface, the authors suggest that the lack of "historical perspective . . . about the place of the U.N. in the development and conduct of U.S. foreign policy" is one reason for their undertaking this work, which they describe as "the first to tell the full story of how the United Nations organization was conceived, planned, argued, revised, and ultimately endorsed by the community of nations . . . and of the decisive role played by Franklin D. Roosevelt" (p. x). As we lament lost opportunities for renewed leadership by the United States in the United Nations and other international institutions after the Cold War, this book provides an important reminder of the formulation and pursuit of a post-World War II vision of world order and the U.S. role in this effort.

Drawing heavily on archival materials, Hoopes and Brinkley recount the political evolution in the United States that led up to Roosevelt's decision not to retain Woodrow Wilson's League of Nations as the security structure on which to build the postwar world. The authors tell the story of the inter- and intra-agency squabbling in the United States that permeated efforts to plan for postwar security, and they confirm FDR's single-minded focus on first winning the war, citing his reluctance to endanger the alliance with the USSR and Britain by prematurely raising controversial issues concerning the details of a postwar international organization. Descriptions of Undersecretary of State Sumner Welles's efforts to undercut Secretary of State Cordell Hull read like contemporary newspaper accounts of maneuvers for Roosevelt's attention. In particular, the authors highlight the President's awareness of the need to enlist congressional and public support for the United Nations; Roosevelt knew that such support had to be actively courted and that

Leadership and direction from the chief executives were crucial to avert the disaster that had befallen Wilson and the League of Nations.

The book begins by noting that, in 1919, former Secretary of State Elihu Root had "proposed that the United States exempt itself from the presumption of an automatic commitment under Article 10" (p. 4) of the League of Nations Covenant, which was regarded as a guarantee among all League members of their territorial and political independence. In the post-Cold War context, Root's concern about U.S. involvement in an "automatic" collective security arrangement serves as a useful reminder that the United States has long been concerned with *both* the constraints and the requirements of using force that international institutions can impose. As Democratic candidate for vice president in 1920, Roosevelt had campaigned for the League but, in the 1930s, he began to turn against it when, as the authors point out, "France and Britain consistently blocked the League's efforts to respond effectively to aggression and used the League as an instrument of their own myopic, self-destructive policies" (p. 9). By the time Roosevelt became President, he was a "thoroughly disenchanted Wilsonian idealist" (p. 11).

The challenge for Roosevelt, as it is for today's U.S. leaders, was to develop a structure and vision for world order in which the United States could most effectively play a role. The book traces how organizations such as the Council on Foreign Relations, the Commission to Study the Organization of Peace (led by James T. Shotwell) and the Carnegie Endowment facilitated and led the public debates on postwar security. Not only did peace plans abound but, perhaps more important, politicians at the subnational level such as New York Governor Thomas Dewey, California Governor Earl Warren and Connecticut Governor Raymond Baldwin began to embrace and promote an active postwar international role for the United States. But, to what end?

For Roosevelt, the aim was clear—to establish a framework for a safe and secure postwar world. He intended that the key powers—the "Four Policemen," as he called Britain, China, the USSR and the United States—would take on a global policing role. (France was eventually also given a permanent seat on the Security Council.) Republican Senator Arthur Vandenberg used the planning for a postwar international organization as an opportunity to formu-

late a position between isolationism and the renunciation of American sovereignty. Meeting at Lake Michigan's Mackinac Island in September 1943, the Republican Party's Postwar Advisory Council adopted a resolution in favor of "responsible participation by the United States in a postwar cooperative organization among sovereign nations" (p. 86).

Today, as the United States attempts to redefine "responsible participation," it may be easy to forget that support for the United Nations was not widespread, even at the end of World War II. Hoopes and Brinkley note that the 1944 election hinged on the terms of U.S. participation in a new international organization (p. 163). Much of the debate focused on the decision-making process to be adopted for authorization of the use of force by the United Nations and the commitment of U.S. troops to UN missions. Roosevelt's view again was clear—since the UN Security Council had to have "the authority to act quickly and decisively, he thought it 'foolish' if a policeman, upon spotting an intruder, was required to call a town meeting before he could arrest the criminal" (p. 164).

Roosevelt's victory in 1944 provided "a clear-cut mandate for American participation in the United Nations and for a large American role in the postwar world" (*id.*). Along with Roosevelt, thirty Democrats were reelected to the House and internationalists such as William Fulbright (D., Ark.), Wayne Morse (D., Or.) and Leverett Saltonstall (R., Mass.) were elected to the Senate. Having successfully navigated the middle ground between those concerned that the United States would become embroiled in conflicts that were not in its interests and those who felt it should play a major international role, Senator Vandenberg became an influential bridge between the Roosevelt administration and his own party on matters of foreign affairs. This bipartisan consensus for "responsible participation" in the United Nations and other international organizations adopted by those elected in 1944 would last into the 1970s. At that time, this consensus for U.S. support for the United Nations broke down in the wake of a series of UN General Assembly resolutions, notably concerning Israel, that made it seem that U.S. global concerns would, at best, be ignored by the organization FDR had founded.

The book concludes with an epilogue bringing this history up to the present and outlining current issues, including the need for presidential leadership in defining the U.S. role in world

affairs. While poll after poll reminds us that the American public is supportive of the United Nations, this has not meant support for the organization in Congress. Furthermore, the inability of Presidents since 1989 to sustain a coherent view of the U.S. role in a global order has also failed to create a climate for consensus, as regards either foreign policy generally or the role of international institutions more specifically. Thus, there has been no policy consensus on a "large American role" after the Cold War analogous to that existing in 1945 and, popular sentiment notwithstanding, there seems to be no clear mandate for U.S. participation in the United Nations today.

Hoopes and Brinkley conclude:

Given the power realities and the responsibility they impose, the United States would be wise to make an effective United Nations a major goal and tenet of U.S. foreign policy. . . . The challenge to the American political system is to recognize both the fundamental importance of the United Nations organization and its inherent limitations. (P. 221)

The book points out that the central concern now, in 1998, as it was in 1945, is to maintain a U.S. role in ensuring a stable and sustainable system of world security. "Responsible participation" was the bridging phrase of the 1940s that provided assurance that active engagement in ensuring global security did not mean giving away U.S. sovereignty. As today's remaining superpower, the United States is challenged to bridge the gap between the limits of American capabilities and other countries' expectations of what they should do to ensure their own security.

Hoopes and Brinkley recall that U.S. involvement in global security has been the result of strong executive leadership with congressional partnership and consensus. That partnership was dealt a serious blow by the Vietnam War and, as a consequence, the U.S. political system is ill-equipped to deal with a post-Cold War world. There is an urgent need to reinvigorate the executive-legislative partnership and redefine the domestic foreign policy consensus to ensure a more effective U.S. role in the United Nations. Hoopes and Brinkley have provided a useful reminder of how the United States took on a global leadership role in the wake of World War II.

CHARLOTTE KU  
Board of Editors

*The United Nations System and Its Predecessors. Volume 1: The United Nations System.* Edited by Hans von Mangoldt and Volker Rittberger. Oxford, New York: Oxford University Press, 1997. Pp. xxxix, 1619. Index. \$280.

*The United Nations System and Its Predecessors. Volume 2: Predecessors of the United Nations.* Edited by Franz Knipping. Oxford, New York: Oxford University Press, 1997. Pp. xlix, 830. Index. \$195.

This hefty two-volume set of documents was compiled as a stocktaking of the UN system's first fifty years. The set includes documents of the United Nations, its specialized agencies, related organizations such as the International Atomic Energy Agency and the World Trade Organization, and the predecessors of the United Nations, including the administrative unions of the late nineteenth and early twentieth centuries and the League of Nations. The first volume deals with the UN system; the second, with its predecessors. The editors are German academics who specialize in contemporary history, public international law, and political science. Although the volumes were published in 1997, the collection runs only through 1995, for the most part.

Volume 1 collects constituent instruments of the United Nations and its related organizations, parliamentary instruments such as statutes and rules of procedure of major UN organs, significant resolutions of major organs, and multilateral treaties adopted or proposed by those organs (particularly the UN General Assembly). The documents are collected on an organ-by-organ basis so that General Assembly documents are organized together with subheadings by subject matter, Security Council resolutions are together with subheadings for states or geographic areas with which each group of resolutions is concerned, and so forth. Each document is preceded by a short editorial comment indicating its source, the vote by which it was adopted and the date of entry into force (where relevant), as well as a brief bibliography. Treaty texts are followed by lists of parties to them and dates of entry into force for each party. Unfortunately, the editorial comments do not indicate which of the UN documents are primarily of historical significance and which were still in force, *de jure* or *de facto*, at the time of compilation.

Even in such a massive volume, the editors were necessarily selective. For example, cover-



age of the International Court of Justice is limited to its Statute and its Rules of Court; coverage of Arab-Israeli issues includes only the General Assembly's aborted 1947 partition plan and Security Council Resolutions 242 (1967) and 338 (1973); and coverage of the progression of South-West Africa to an independent Namibia consists only of Security Council Resolution 435 (1978), which established the United Nations Transition Assistance Group.

Since the documents in volume 1 are collected under the heading of each issuing organ or agency rather than by subject matter, a researcher seeking documents on a particular subject may have to look in more than one section to find them all. Thus, documents relating to self-determination are found at various places throughout the book and documents on the Middle East appear under the UN General Assembly heading and later under the Security Council. Happily, there is an excellent index to guide the reader to the relevant documents.

The editors' decision to issue volume 1 as a documentary snapshot of the United Nations' first fifty years has both strengths and weaknesses. It provides the student of the United Nations with a nice view of most of the important documents generated by and within the UN system during that time, in their official English-language version. Despite all the recent complaining in the U.S. Congress and elsewhere about UN inefficiency, one cannot help but be struck by the quantity of documents—many of them quite significant to the development of a world order system—produced under UN auspices in just fifty years. Volume 1 thus serves as a very useful documentary history up to 1995. But a researcher hoping to use it as a current reference work must be wary. Some of the documents are no longer in force or at least no longer influence the events they were designed to affect. Other documents, such as the Constitution and Convention of the International Telecommunication Union and some rules of procedure, are subject to frequent modification, yet the volume provides no promise of periodic supplements or any other means of keeping its readers up to date.

Volume 2 is a treasure trove of early documentary history. It begins with the system of Vienna of 1815, gives a glimpse of the early

adopted at the 1899 and 1907 Hague Conferences), reproduces the agreements establishing the major administrative unions of the nineteenth and early twentieth centuries, and then provides seventy-seven documents of and relating to the League of Nations. Many of these documents are difficult to find elsewhere. Of particular interest to readers of this *Journal* are documents on disputes that held the League's attention, including those concerning the Åland Islands, Upper Silesia, Turkey/Iraq, China/Japan, Colombia/Peru, Bolivia/Paraguay, Italy/Ethiopia, Spain, and the Soviet Union/Finland. The volume concludes with constituent instruments of organizations other than the League of Nations from the period 1919 to 1933, as well as selected multilateral treaties from that period.

Presumably, the United Nations and the League of Nations documents will occupy center stage for most researchers. Insofar as international law scholars and political scientists have focused on nonregional intergovernmental organizations, they have paid far more attention to these two organizations—one current, one a matter of history—than to the specialized agencies and other related organizations. One could argue, however, that the specialized agencies and their predecessors deserve more scholarly attention than they have received. The stuff of most law, after all, is largely the ordering of undramatic, day-to-day transactions and relationships. Such is the case with international law, as it is with municipal law. The specialized agencies provide the legal and operational framework for such important, but unspectacular, imperatives as supplying the rules of the air for international civil aviation, facilitating transnational communication by mail or by satellite, and setting standards to prevent the spread of communicable diseases. A variety of rule-making, dispute settlement and enforcement tools have been developed to deal with the issues these agencies face.

The set under review provides a starting point (though only that) for attention to these matters. Volume 1 contains the constituent instruments of the specialized agencies and a few important instruments produced under the aegis of some of the agencies. However, most of these items are readily available elsewhere. Most interesting is the inclusion in volume 2 of



ized agencies. For example, volume 2 includes the 1874 treaty establishing the General Postal Union, the predecessor to the Universal Postal Union of today; even at that early date, the union's central office was given express authority to give an opinion on matters of dispute, at the request of the parties concerned. The 1875 treaty establishing an International Bureau of Weights and Measures created an international committee empowered to make regulations for the organization, including budgetary provisions, by majority vote. Weighted voting was introduced in the International Institute of Agriculture in 1905 and in the International Office of Public Health in 1907.

Particularly interesting is the fact that most quasi-legal features of the current Constitution of the International Labour Organization stem from its origin in part XIII of the Versailles Peace Treaty of 1919, which is included in volume 2. Versailles gave birth to the tripartite system of representation in the General Conference (two government representatives, and one management and one labor representative for each member state), the adoption of labor conventions and recommendations by two-thirds majorities in the General Conference, the undertaking by each member state to submit adopted conventions and recommendations to the appropriate domestic authorities for adoption of legislation or other action, and the duty to ratify conventions that obtain the consent of the competent domestic authorities. The only significant quasi-legislative feature of the current ILO Constitution, missing in 1919, is the duty of member states to report at appropriate intervals to the organization on their law and practice relating to matters dealt with in labor conventions and recommendations to which their competent authorities have not consented.

Volume 2 has other useful features as well. The introductory comments to the documents in volume 2, including the bibliographies, are more informative than those in volume 1. Treaty texts in volume 2, like those in volume 1, are followed by lists of states, parties and dates of entry into force.

The set will be extremely useful to anyone looking for a convenient documentary history of public international organizations. It brings together a rich collection of treaties, resolutions and other instruments of great importance to international law scholars, historians and political scientists interested in the United Nations,

the League of Nations, international regimes and, more generally, the development of world order. Volume 2 of the set is especially welcome as it compiles in one book a variety of hard-to-find documents antedating the United Nations. The UN materials in volume 1 are more readily available from other sources, but it is nevertheless quite useful to have them collected here. Any university or law school research library should have this set.

FREDERIC L. KIRGIS  
*Board of Editors*

*International Environmental Law, Policy, and Ethics.* By Alexander Gillespie. Oxford: Clarendon Press, 1997. Pp. xiv, 210. Index. \$68.

In this concise volume, Alexander Gillespie, a lecturer in law at the University of Waikato in New Zealand, sets forth the provocative central thesis that the "intellectual mind-sets and the programmes that flow from them . . . are misplaced and ultimately contradictory to the objective of protecting the environment" (p. 1). He asserts that the paradigms available to justify protecting the environment are flawed. "Any 'answers' [in the book] will be provided by pointing to routes we should not be pursuing, rather than routes we should be" (p. 2).

Gillespie divides the ethical approaches to environmental protection into two categories: those that are anthropocentric and those that are not. While anthropocentrism has permeated and dominated all national and international environmental law, he sees a slow growth in the last twenty years of non-anthropocentric ethical bases in international environmental law. Gillespie prefers non-anthropocentric approaches and seems most comfortable with what he terms the deep ecology approach, in which the natural world is viewed holistically (with humans as a part of the whole) and the guiding principle is one of "biospherical equality" (p. 162).

Almost two-thirds of the book (pp. 4-126) critiques the anthropocentric approach. Gillespie treats separately the philosophical roots of anthropocentrism and the justifications for it. He identifies five conceptual roots: a division between the physical and mental worlds (derived from the early rationalists Pythagoras and Plato); the division of the world into "insular understandable parts" and the subsequent emergence of individualism (derived

from Descartes, Augustine, Kant and others); a dichotomy between humanity and nature (attributed to Aristotle, Aquinas, Locke and many others); a failure to value nature apart from the labor added to it (ascribed to Aquinas and Marx); and the assumed right to master nature (attributed to Francis Bacon, Locke, Kant and others). Gillespie quotes from several international environmental agreements, soft-law instruments and international policy reports to show that anthropocentrism permeates international environmental law.

The main portion of the book (chapters 2-10) is devoted to discussing the various justifications that have been suggested for both the anthropocentric and the non-anthropocentric approaches to environmental protection. Gillespie identifies seven anthropocentric justifications: self-interest, economic, religious, aesthetic, cultural and recreational rationales, and the rights of future generations (p. 18). Non-anthropocentric justifications include the moral interest of animals, respect for all life, and the holistic land ethic. For each justification, the author identifies underlying philosophical assumptions, references documents and policies incorporating the justification, and raises flaws in its theoretical effectiveness to protect the environment.

The book provides thoughtful and provocative analysis of the ethical bases for protecting the environment. The historical review of relevant philosophers and scholars is almost encyclopedic, and the attached bibliography of relevant literature is selective and useful.

However, Gillespie makes several controversial assertions and assumptions. The first is that it is not possible to combine anthropocentric and non-anthropocentric justifications to craft an effective philosophical underpinning for protecting the environment. One can argue that there are two fundamental dimensions of environmental protection: our relationship with the environment and our relationship with other generations of human beings. Each of these may suggest somewhat different responses, but these responses need not be incompatible or mutually exclusive. For example, it is possible both to believe that humans are part of a holistic system whose robustness and integrity must be respected and to combine this idea with a definition of the rights and obligations of generations to each other regarding their relationship to the natural system of which they are a part. Gillespie quotes from different

international legal instruments to support his assertion that one or another specific justification has been adopted. However, in almost all the documents cited, at least two or more ethical justifications appear. This reflects the reality that there are many reasons why countries and other actors choose to protect the environment.

Gillespie's assertion that all currently employed approaches are counterproductive to protecting the environment is also dubious. Although some of the ethical bases can be counterproductive, particularly if taken in the extreme or not combined with other bases, they can also be productive. The dramatic growth of both national and international legal instruments to protect the environment since 1972 demonstrates this. In 1998, there were more than a thousand international legal instruments focused on environmental protection or containing one or more important provisions addressing it. To be sure, questions remain as to whether countries will comply with these instruments and whether they will be effective, but many factors other than the philosophical bases for the instruments determine their efficacy.

Gillespie correctly observes that, in the last two decades, there has been movement toward including non-anthropocentric justifications for protecting the environment. Although he cites numerous documents to support this contention, most, if not all, of these examples also include anthropocentric bases for protection. Moreover, his suggestion that this trend will continue is not an obvious conclusion. As Gillespie recognizes, poverty is a primary form of environmental degradation and forecloses for many the ability (and the will) to protect the environment. Until we can effectively address issues of global poverty and concerns about equity among communities, it will be difficult to sustain environmental protection. Furthermore, non-anthropocentric ethical bases of environmental protection will likely not gain in popularity. As the 1992 Rio Conference on Environment and Development made clear, the ethical bases for protecting the environment have to be rooted in equitable notions about both our relationship to each other and to other generations and our relationship to the natural system.

Readers will enjoy this stimulating book and the author's refreshing, critical style in

addressing the philosophical bases for our actions to protect (or often to degrade) the environment.

EDITH BROWN WEISS  
Board of Editors

*Trade and Environmental Law in the European Community.* By Andreas R. Ziegler. Oxford: Clarendon Press, 1996. Pp. xxxii, 290. Index. \$90.

*Trade and the Environment: A Comparative Study of EC and US Law.* By Damien Geradin. Cambridge, New York, Melbourne: Cambridge University Press, 1997. Pp. xxiv, 228. Index. \$64.95.

Each of the books here under review explores a subject of increasing importance and controversy within the European Community, within the United States and other nations, and in international relations—the relationship between trade and the environment. However, they do so from somewhat different perspectives and take different approaches.

*Trade and Environmental Law in the European Community* by Andreas Ziegler—an associate researcher at the Swiss Institute for Research into International Economic Relations, University of St. Gallen—begins with an introductory overview, followed by a more detailed discussion divided into two parts, “Undistorted Trade and Competition and Domestic Environmental Measures” and “Community Environmental Law and Domestic Environmental Measures,” respectively. The entire monograph is organized into twelve chapters. The author starts his introduction (chapter 1) with a general discussion of the integration of trade and the environment and then explains his approach, which is based on the idea that the effective and adequate protection of the environment has become the shared responsibility of the European Community and the member states. Ziegler maintains that the Community has established a “very comprehensive system for the balancing of ecological and trade interests” (p. 9).

Part 1 of the book begins with chapter 2, which introduces the instruments used for the creation of a common market that focuses on trade in goods and its potential collision with domestic measures to protect the environment. Ziegler sets forth the nondiscrimination approach and the market-unity approach to the

free movement of goods, which the author somewhat confusingly characterizes both as a “restrictive interpretation” and as a “broad approach” (p. 27). According to the latter approach, “restrictions on trade imposed by national regulations are only lawful on grounds of certain public interests defined by the superior level of the divided power system” (p. 27). In chapter 3, the author gives a detailed explanation of the concept of the free movement of goods, emphasizing measures that have equivalent effects as restrictions, and the *Dassonville* and *Cassis de Dijon* formulas. In *Dassonville*, the European Court of Justice (ECJ) held that “all trading rules enacted by Member States which are capable of hindering, actually or potentially, directly or indirectly, intra-Community trade are to be considered as measures having equivalent effect to quantitative restrictions.”<sup>1</sup> *Casson de Dijon* significantly modifies *Dassonville* by holding that

[o]bstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of products in question must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.<sup>2</sup>

The third chapter’s section on discriminatory taxation contains several references to specific environmental issues.

Chapter 4 on environmental justification for national restrictions sets forth the relevant case law of the ECJ as it developed on the basis of the *Dassonville* and *Cassis de Dijon* formulas. The author concludes that protection of the environment has now found its place among the justifications included under the “rule of reason” established in the latter case. In chapter 5, entitled “Conditions for Domestic Environmental Measures,” Ziegler discusses the difficulties in comprehensively defining the term “protection of the environment” and then sets forth the components of the proportionality principle—namely, the requirements that a measure be reasonable and suitable, the least restrictive possible, and not disproportionate or excessive.

<sup>1</sup> Case 8/74, *Procureur du Roi v. B. and G. Dassonville*, 1974 ECR 837, 852.

<sup>2</sup> Case 120/78, *Cassis de Dijon*, 1979 ECR 649, 662.

The author maintains that the ECJ is willing to allow member states a great deal of discretion in evaluating the necessary levels of protection and the adequacy of measures taken. According to the author, "The precautionary principle and the Treaty's reference to a high level of protection seem to strengthen this approach" (p. 123). Chapter 6 on fair and undistorted competition and the environment discusses the compatibility of agreements between states and undertakings with the general system provided under the Treaty Establishing the European Community (Treaty)<sup>3</sup> to ensure undistorted competition within the Common Market (Article 85) and with state aids (Article 92).

Part 2 of the book describes the historical development of the environment-related policy of the Community. The author underscores the principles of shared responsibility and subsidiarity with regard to the distribution of powers between the Community and the member states (pp. 144-45). Then Ziegler describes the development of the provisions on the general approximation of laws. In accordance with the wording of Article 100a, paragraph 4 of the Treaty, he argues that member states not only are allowed to maintain divergent municipal provisions relating to the protection of the environment, but also may introduce such provisions after the adoption of a Community harmonization measure. Chapter 9 on selected Community policies and the environment discusses such subjects as common agricultural and transport policies and environment-related social and environmental research policies. In chapter 10, the author rightly stresses that pricing instruments for the establishment of incentives and disincentives regarding ecological behavior are increasingly important elements of environmental policy. However, owing to the limited extent of fiscal harmonization, these instruments currently affect only domestic environmental policy rather than Community-level policy. Chapter 11 examines Community external relations and environmental protection. After explaining the leading external relations case (*ERTA*),<sup>4</sup> Ziegler briefly outlines the legal basis for "multilateral agreements using trade related environmental measures

(TREMS)" (p. 209) and then covers the issues of diverging national measures under multilateral environmental agreements and international trade and commodity agreements.

The last chapter of part 2, similar to chapter 1 on integration of trade and the environment, is entitled "Integration of the Common Market and the Environment." Ziegler repeatedly refers to the significant changes in environmental policy brought about by the Single European Act (1986). He concludes that the

search for a balance between market unity and diverging environmental conditions calls for legal mechanisms which allow for a limited application of more stringent environmental measures according to local-needs without giving way to the Balkanization of the common market. To combine market integration and optimal protection of the environment the Community has to establish its own environmental policy at an already high level of protection and at the same time allow Member States to adopt more stringent measures where they seem reasonably justified. (P. 244)

*Trade and the Environment: A Comparative Study of EC and US Law*, by Damien Geradin, an assistant professor of law and a fellow of the Institute for European Legal Studies at the University of Liège, is also divided into two parts dealing with negative harmonization and positive harmonization, respectively. In the first chapter of part 1, the author discusses the case law of the European Court of Justice, particularly criticizing the so-called *Belgian Waste Case I*,<sup>5</sup> which allows for a special regime for waste in the framework of the free movement of goods. Because of the supposed "weaknesses of the reasoning" of the Court (p. 20), Geradin regards that case as a dangerous precedent, even though Article 130r, paragraph 2 of the Treaty supports this reasoning. He points to the problem that, "[a]lthough the adoption of lax process standards may create distortions of competition, it does not create the kinds of barriers to trade susceptible to falling within the scope of Article 30 of the Treaty" (p. 31). After explaining the case law of the U.S. Supreme Court, the author presents a comparative analysis, emphasizing that the waste cases demonstrate

that for the Supreme Court, the restriction was discriminatory because it was sup-

<sup>3</sup> Mar. 25, 1957, 298 UNTS 11, as amended by Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 24) 1.

<sup>4</sup> Case 22/70, *Commission v. Council (ERTA)*, 1971 ECR 263.

<sup>5</sup> Case C-2/90, *Commission v. Belgium*, 1992 ECR I-4,431.

posedly based on no reasons other than origin. The reasoning of the Court of Justice was just the opposite in that the origin of waste was seen as a valid justification in itself. What was a cause of condemnation in the Supreme Court was a cause of justification in the Court of Justice. (P. 56)

Geradin hints at political reasons for the ECJ's divergent decision and he maintains that the jurisprudence of the European Court of Justice and the U.S. Supreme Court have developed in similar ways.

Part 2 consists of three chapters (5-7): "Harmonization in European Community law," "Harmonization in United States law" and "Comparative Analysis." In chapter 5, Geradin explains the principle of attributed powers and its significance for environmental protection measures under the Treaty in its original form, under the Treaty as amended by the Single European Act and, finally, by the Treaty on European Union (1992) with regard to the principles of subsidiarity and proportionality. He then suggests that "in practice, the principle of proportionality will have a more taming influence on the development of Community environmental law than the principle of subsidiarity" (p. 97), which "does not appear to impose serious limitations on Community intervention in that field" (p. 98). Geradin wisely advocates judicial restraint regarding both principles, as they involve delicate political judgments. With respect to the harmonization of environmental product standards by Community legislation, he sees a serious danger that industry will dominate the standardization process. Concerning the regulation of transborder movements of waste, the author, possibly influenced by the U.S. approach, predicts that there will be litigation over the validity of restrictions on the movement of waste and on the boundaries within which member states may restrict the movement of waste in order to implement the principles of proximity and self-sufficiency. The last section of chapter 5 discusses preemption and its modification by the Single European Act.

Chapter 6, on harmonization in U.S. law, discusses the system of limited, attributed federal powers under the U.S. Constitution. According to Geradin, in view of the fact that the Constitution does not contain any specific grant of lawmaking authority to the federal Government with regard to environmental matters, it might have been argued that the authority to

regulate the environment remains with the several states. However, as the author points out, the U.S. Supreme Court has interpreted several federal lawmaking powers, particularly the "Commerce Clause," so broadly "that virtually any conceivable measure intended to protect the environment can readily be sustained under one or more of the grants of authority to Congress" (p. 144). According to Geradin, Congress often adopts a form of "creative" or "cooperative" federalism, leaving little room for the states (p. 152). He notes, however, that "U.S. constitutional law contains no judicially enforceable provisions designed to limit the exercise of Congressional powers in the areas of shared competence, including environmental protection. The residual powers of the states are to be protected through the political process in Congress rather than judicial intervention" (pp. 155-56). The author explains that the principal rationale for uniform environmental process standards was to prevent states from adopting strategies of competitive deregulation, as well as to prevent southern states from exploiting "their natural locational advantages" in order to attract investment opportunities.

The section on waste points out that the U.S. Congress has so far failed to restrict, or at least control, interstate movements of waste. Under the Commerce Clause, states are generally not allowed to restrict the import of wastes. Thus, the few states that possess adequate waste disposal facilities have become dumping grounds for the rest of the United States. Against this background, it is surprising that the author views the European Court of Justice's *Belgian Waste Case* so critically.

The last section of chapter 6 deals with the Supreme Court's doctrine of preemption, explaining that U.S. federal courts will invalidate state laws only if it is "the clear and manifest purpose of Congress" that an area be exclusively federally regulated" (p. 180). In a comparative analysis in chapter 7, Geradin criticizes the European Court of Justice for lacking direction in its preemption case law: "There are only a few court decisions in this area and these are inconsistent" (p. 197).

Geradin's book comes to the following conclusions: (1) In the area of product standards, a fair balance has generally been struck between the Community/federal interest in regulatory uniformity and the state interest in environmental diversity. (2) With regard to environmental process standards, economic integra-

tion has led to a "leveling up," by which states applying strict process standards have generally managed to ensure that states applying lax process standards realign their standards to match the stricter standards. (3) In the area of waste, however, "environmental protection does not necessarily benefit from economic integration" (p. 201). Finally, the author stresses that further studies are needed to analyze the external or global aspects of the relationship between trade and environmental protection.

Both Ziegler's and Geradin's books contribute to the further understanding of a tension that is of growing importance to an increasingly global society—the dichotomy between international trade and nonglobal standards for the protection of the environment.

However, while both books are useful, their emphasis is different. Ziegler's book, which deals solely with the EU system, offers no new insights but describes the relevant Community law as it has developed over time. Ziegler appears to see no major problems in this respect: the protection of the environment is a shared responsibility of the Community and its member states; domestic and Community measures complement each other; and the abuse of environmental measures by municipal authorities for the hindrance of trade or distortion of competition can be avoided through the strict application of Community principles.

In contrast, Geradin has carefully researched and compared the relevant U.S. and European trade and environmental law and shows that there is not necessarily only one solution to various problems regarding the relationship between trade and environment. His well-structured book demonstrates the advantages of a comparative approach and encourages us to search for the best solution to each problem.

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*Pollution from the Carriage of Oil by Sea: Liability and Compensation.* By Wu Chao. London, The Hague, Boston: Kluwer Law International, 1996. Pp. xvi, 422. Index. Fl 250; \$163; £110.

This book is based on a monograph published in French, entitled *La pollution du fait du transport maritime des hydrocarbures. Responsabilité et indemnisation des dommages* (1994), which itself represented the publication of a doctoral dissertation written under the guidance of Professor Brigitte

Stern of the University of Paris. The dissertation received an award from Monaco's Institut de droit économique de la mer (INDEMER).

In this book, Ms. Wu Chao addresses the particular legal regime applicable to pollution caused by the carriage of oil by sea. The major merit of the book is that, rather than simply describing the international agreements applicable to this field of law, the author places the issue in a broad framework. In addition to including the voluntary agreements entered into by oil company shipowners, which is a common practice in the specialized literature on the subject, Wu devotes a substantial part of her book to discussing relevant municipal law and how it is applied by the judiciary. She devotes special attention in this respect to the U.S. Oil Pollution Act of 1990. Not only does the author meticulously describe the content of these different legal instruments, based on an in-depth study of their *travaux préparatoires*, but also she takes the analysis one step further by trying to paint a picture of the global interaction of these separate legal instruments, which include both classic interstate agreements and voluntary agreements by the industry and national legislation enacted by the different states.

It is not by accident that the first chapter of the book uses the *Torrey Canyon* incident of 1967, which involved a major oil spill off France, as a starting point to examine this particular sub-branch of international law in which legal developments often result in reaction to particular events—for example, important oil spills normally trigger the establishment of new legal instruments on a global, regional or municipal basis. Thus, to better understand the international reaction to the *Torrey Canyon* oil spill, which for the first time focused international attention on this particular issue, Wu starts her inquiry at the national level, examining whether municipal law in 1967 was adequately equipped to deal with such catastrophes. She takes advantage of the fact that France and the United Kingdom were the states most affected by the incident to restrict this tour d'horizon to one civil and one common law country. Noting that each state's compensation system for such accidents was based on laws dating from a previous century, the author concludes that the funds provided under either system would have been "largely insufficient to cover the actual damage" (p. 19). The author then reviews the instruments that make up the existing international framework: the 1924 and 1957 conventions on the limitation of shipowners' liability; the

1969 International Convention on Civil Liability for Oil Pollution Damage; the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage; the 1969 Tanker Owners' Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP); the 1971 Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL); the 1984 Protocols to the above-mentioned 1969 and 1971 Conventions, the 1985 Pollution Liability Agreement among Tanker Owners and the 1985 Revised CRISTAL (which never entered into force); the 1985 TOVALOP Supplement; and the 1987 Contract Regarding a Supplement to Tankers' Liability for Oil Pollution (CRISTAL 2).

In chapter 2, the author examines why the current international conventional regime is not functioning properly. She suggests two sets of reasons that can be found partly outside and partly inside this conventional regime. The main reason outside the treaty regime itself, which not only sealed the fate of the 1984 Protocols but also accelerated the disappearance of the voluntary system, was the enactment in 1990 by the United States of its Oil Pollution Act. Wu argues that, by going *cavalier seul*, the United States fundamentally disturbed the international legal regime and undermined its future. According to the author, who maintains that a uniform regime on the international level should be preferred to unilateral claims in this domain (a point of view fully supported by this reviewer),<sup>1</sup> this was a most unfortunate development (p. 215). The author notes, however, that the U.S. action is partly to be explained by what she calls "the intrinsic difficulties in applying the international conventions" (pp. 275–385). This brings her to the second reason, intrinsic to the conventional regime, namely, the refusal so far by the International Oil Pollution Compensation Fund to cover environmental damage. On the basis of her conclusion that the international legal regime will have to adapt itself if it is to continue to play a central role in dealing with such oil pollution prob-

lems, Wu develops and presents a concrete set of proposals on what kind of damage should be covered by the international conventional system (pp. 370–83).

This book is certainly recommended wholeheartedly to all, laymen or experts, interested in the subject. But, if the substance of the book deserves the highest praise, the same cannot be said for the form and the manner in which it was translated from French into English. There are simply too many mistakes, especially in the footnotes, such as incomplete notes, inconsistent internal references as well as other inconsistencies, repetition of text notes and citation of French legislative documents omitting all accents. Moreover, unlike the French version, a list of abbreviations is not included, which is particularly regrettable since abbreviations are used often and are only sometimes explained many pages later. Also worth mentioning is the rather curious translation policy adopted by the author. With respect to French court decisions and legislation, she properly cites them in the original French and then also supplies her own English translation. However, with respect to writings by various authors in French, she automatically translates excerpts into English without indicating that she is giving her own translation. Moreover, the author provides her own English translation of European Community legislation given in the *Journal Officiel*, the official French gazette of the EC, which does not always correspond to the authentic translation readily available in the *Official Journal of the European Communities*, the official English-language gazette.

This again suggests a comparison between this English version and the French version on which it is based. It would appear that, apart from some minor changes, only two substantially new chapters were added to the English version—a chapter on the Rules for National Resources Damage Assessments as proposed by the U.S. National Oceanic and Atmospheric Administration during the summer of 1995, and a rather technical chapter on the entry into force in 1996 of the 1992 Protocols. Neither, however, changes the main thrust of the book. Thus, an interested reader with command of French might be better served by the 1994 French version of this most interesting and thoroughly researched work.

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<sup>1</sup> Erik Franckx, *Coastal State Jurisdiction with Respect to Marine Pollution: Some Recent Developments and Future Challenges*, 10 INT'L J. MARINE & COASTAL L. 253, 257 (1995); and Franckx, *Évolutions récentes du droit de la mer dans ses relations avec l'environnement*, in L'ACTUALITE DU DROIT DE L'ENVIRONNEMENT 227, 233 (Actes du colloque des 17–18 novembre 1994, Brussels, 1995).

*Self-Determination and National Minorities*. By Thomas D. Musgrave. Oxford: Clarendon Press, 1997. Pp. xxxv, 274. Index. \$95.

A plethora of books on self-determination and related topics has appeared in the past few years as the world has rediscovered "ethnic conflict" and pretended that "complex emergencies" were a new phenomenon. The volume under review began as a Ph.D. thesis at the University of Sydney, and the author is now a lecturer in law at the University of Wollongong in Australia.

*Self-Determination and National Minorities* begins promisingly enough, juxtaposing in its title two concepts that politicians and international lawyers have tried to keep separate. It is black-letter international law that minorities do not enjoy any right to self-determination, but reality clearly requires any analyst to go beyond definitional parsing of "minority," "people," "nation" and similarly problematic terms. This the author does.

The book is structured in a standard manner: beginning with three primarily historical chapters, followed by three chapters that purport to examine the current status of international law, and concluding with four chapters that address, respectively, specific issues related to the term "people," secession, irredentism and claims to territory based on historical title. Unfortunately, there is no concluding chapter or other attempt to draw together the various strands of the discussion. This omission evidences a larger failure of the work; it is descriptive, but it lacks any focus or perspective that might enable us better to understand the concepts discussed.

The historical chapters contain little that has not been well presented elsewhere, although they do provide a generally well-written summary of nationalism, self-determination and minority protections up to 1945. The discussion of nationalism (pp. 2-14) is unavoidably superficial, distinguishing the competing views of self-determination as reflecting either popular sovereignty and representative government or ethnic and cultural identity. The simplistic identification of the first of these views as "Western European" and the second as arising in "Central and Eastern Europe" is somewhat misleading, although it would be unrealistic to expect a comprehensive examination of such a complex topic.

Musgrave's description of current international law with respect to self-determination (chapters 4 and 5) and minorities (chapter 6) is

somewhat less satisfactory. His discussion of the development and meaning of relevant UN General Assembly resolutions is adequate, but the description (pp. 66-69) of the only binding treaty provisions on self-determination—common Article 1 of the two International Human Rights Covenants, which have been ratified by over 140 states—is cursory, at best. The *travaux préparatoires* of the Covenants may not lead to definitive answers to the many complex questions Musgrave rightly raises,<sup>1</sup> but they deserve much fuller treatment than they receive here. With respect to minority rights, there is no discussion at all of either the Human Rights Committee's 1994 General Comment on Article 27 of the Covenant on Civil and Political Rights<sup>2</sup> or the very significant Final Document adopted at the Copenhagen meeting on the Human Dimension of the (then) Conference on Security and Co-operation in Europe in 1990, which contains detailed provisions on minority rights applicable to the fifty-five member states of the (now) Organization for Security and Co-operation in Europe.<sup>3</sup> Musgrave's discussion of indigenous rights (pp. 172-77) inappropriately refers to an early (1992) draft of the UN declaration, not the significantly altered 1993 draft that was accepted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and is currently under consideration by the Commission on Human Rights.<sup>4</sup>

Although chapter 5 claims to examine state practice regarding self-determination, it includes much less research and analysis than might legitimately be expected on this vital topic. Many of the references to "state" practice are merely citations to secondary sources (*see, e.g.*, p. 94, notes 14-17; p. 101, note 45), an approach adopted frequently throughout the book. The weak conclusions that "most" states "deny that ethnic groups have any right to self-

<sup>1</sup> *See, e.g.*, ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES* (1995); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 17-25 (1993).

<sup>2</sup> UN Doc. CCPR/C/21/Rev.1/Add.5 (1994).

<sup>3</sup> Adopted June 29, 1990, *reprinted in* 29 ILM 1305 (1990).

<sup>4</sup> Draft Declaration on the Rights of Indigenous Peoples, in UN Doc. E/CN.4/Sub.2/1993/29, Annex 1 (1993). A separate declaration on indigenous rights has been under consideration by the Organization of American States since 1989. *See* Hurst Hannum, *The Protection of Indigenous Rights in the Inter-American System*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 323 (David J. Harris & Stephen Livingstone eds., 1998).



determination" (p. 104) and that "[m]ost Third World states . . . maintain that self-determination does not include secession" understate the fact that, in reality, no state has publicly supported ethnically based secession as a generally applicable principle.

Musgrave discusses the international reaction to the disintegration of Yugoslavia at various points in the book (pp. 114–24, 200–07, 229–37), and he persuasively criticizes that reaction in many respects. Despite the efforts of the European Union and the United States to portray their recognition of the former Yugoslav republics within existing internal boundaries as reflecting "civic" self-determination, "[a]n inevitable result of allowing self-determination to occur within a territorial unit which has been organized on an ethnic basis . . . was the perception that an act of ethnic self-determination had occurred" (p. 124). The Badinter Arbitration Commission, established by the International Conference on Yugoslavia in 1991, comes in for particularly harsh criticism for, inter alia, its characterization of the situation in Yugoslavia as one of "dissolution" rather than "secession" (pp. 202–03), its discussion of minority rights (pp. 142–43, 170–71), and its application of the principle of *uti possidetis*, which the author regards as "unrealistic and unworkable, as well as bad law" (p. 236).<sup>5</sup>

The remaining chapters reflect both the positive and the negative aspects of earlier portions of the work. Chapter 7's discussion of "peoples" accurately identifies the problems inherent in most definitions of that term, but it also contributes to the confusion in its own right. For example, Musgrave's criticism of the "representative government definition" as omitting linguistic, cultural and religious factors (pp. 152–53) seems to assume that individuals have only a single relevant identity or that the "considerable problems" created by a multiethnic polity necessarily undermine the equation of "people" with "citizens" for all purposes. It also seems inaccurate to suggest that the United Nations acceptance of Bangladesh as a member in 1974 (three years after its de facto secession from Pakistan) implicitly equated

an ethnic group with a people (p. 160) or recognized the latter's right to secede (pp. 189–92), since admission to the United Nations occurred only after Pakistan itself recognized Bangladesh's independence.

At the same time, Musgrave rightly observes that "[d]isputes between ethnic groups . . . cannot be resolved through an appeal to the will of the majority, because the will of the majority will simply reflect the position of the most numerous ethnic group within the territory" (p. 153).

The chapters on secession, irredentism and historical title are largely descriptive rather than analytical, with the exception of the above-cited discussions of the Badinter Commission. Musgrave notes that secession from non-self-governing territories seems to be prohibited by paragraph 6 of General Assembly Resolution 1514, although division of colonial territories was approved in practice in several cases both before and after the adoption of Resolution 1514 in 1960. In discussing secession from independent states, however, Musgrave is torn between two views. On the one hand, he is tempted to accept the legitimacy of secession "as a legal remedy" in situations where a government is not representative of "the whole people belonging to the territory"<sup>6</sup> (p. 209) or where a group (people?) is a victim of oppression (pp. 188–89). On the other hand, he recognizes the competing view that secession is a purely domestic matter neither prohibited nor legitimized by international law (pp. 192–93). Although he seems to opt for the latter proposition (p. 235), he resurrects the "oppression theory" in the book's final pages (p. 258).

Musgrave also confuses the international status of autonomy arrangements within a state with the status of autonomy as an acceptable result of an exercise of self-determination (pp. 207–08). The latter is certainly permissible under General Assembly Resolution 2625 (1970), which recognizes "the emergence into any other political status freely determined by a people" as one of the legitimate modes of exercising a people's right to self-determination. The fact that such status may not be cognizable under international law once achieved no more undermines its acceptability as a form of self-

<sup>5</sup> The reviewer should confess to sharing similar views. See Hurst Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?* 3 TRANSNAT'L L. & CONTEMP. PROBS. 57 (1993).

<sup>6</sup> GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. 8/8028 (1970).

determination than does the purely domestic status that results when a colony chooses full integration with an administering state rather than independence.

The book's short epilogue is little more than an executive summary of preceding chapters. It concludes by noting the obvious:

International law does not deal adequately with many of the problems associated with self-determination. However, . . . the very nature of self-determination renders it less than amenable to the prescriptive processes of the law. The concept of self-determination remains elusive, and defies all attempts to generalize its characterization. Moreover, its implementation usually creates as many problems as it solves—including, paradoxically, further claims to self-determination. (P. 259)

Musgrave's failure to articulate an overarching view of the purpose of self-determination or its contemporary content (beyond the recitation of competing opinions) leaves the reader with a volume that ultimately seems to be less than the sum of its parts. The historical materials and much of the discussion of contemporary law are useful, but they offer few original insights. The reflections on the international community's response to the disintegration of Yugoslavia are certainly welcome, and the book is well written.

However, to have concluded in 1997 that the concept of self-determination is inconsistent and confused is hardly new.<sup>7</sup> Without deeper analysis of the highly problematic right of self-determination or a more probing investigation of the role of international law in governing minority-majority relations within states, this remains only a workmanlike volume that raises far more questions than it answers.

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<sup>7</sup> More thoughtful recent examinations may be found in CASSESE, *supra* note 1, and PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (1991). Earlier works have more than adequately treated the pre-1989 situation. See, e.g., LEE C. BUCHHEIT, *SECESSION* (1978); W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* (1977); MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* (1982); and A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* (1973).

*The OSCE in the Maintenance of Peace and Security: Conflict Prevention, Crisis Management, and Peaceful Settlement of Disputes*. Edited by Michael Bothe, Natalino Ronzitti and Allan Rosas. The Hague, London, Boston: Kluwer Law International, 1997. Pp. xix, 518. Index. Fl 295; \$182; £115.

In *The OSCE in the Maintenance of Peace and Security*, Michael Bothe (professor at Johann Wolfgang Goethe University in Frankfurt), Natalino Ronzitti (professor at the University of Pisa and scientific adviser at the Istituto Affari Internazionali in Rome) and Allan Rosas (principal legal adviser to the Commission of the European Communities) undertake the ambitious task of "analyzing some features of the emerging security framework and putting them into a political, institutional and legal (normative) perspective" (p. ix). They focused on the Organization for Security and Co-operation in Europe (OSCE) because of its broad membership and the key role it plays in European peace and security initiatives. To this end, they compiled twenty-one contributions on this subject by European academics and practitioners.

The OSCE, which grew out of the Conference on Security and Co-operation in Europe (CSCE) in 1994, began developing its institutional and organizational structures when the 1990 Charter of Paris initiated a regular schedule of meetings for the participating states and established permanent offices in Vienna, Warsaw and Prague. Since then, the OSCE has continued to reinvent itself in an effort to adapt to the needs of its post-Cold War, transatlantic, Eurasian membership. Trying to describe and analyze the OSCE at any given point in time is like trying to photograph a moving object.

In the face of this challenge, Bothe, Ronzitti and Rosas have done an excellent job. They have produced a comprehensive survey that, reflecting the OSCE's own broad approach to the concept of security, includes an article on the human dimension (human rights and humanitarian concerns), as well as articles addressing more predictable security subjects such as peacekeeping and relations between the OSCE and NATO. For the most part, *The OSCE in the Maintenance of Peace and Security* is not written for the uninitiated, and most of the articles assume that the reader has some basic knowledge of the OSCE. It is a densely packed volume that provides considerable information on several areas of OSCE activity related to conflict prevention, management and resolution.

The editors begin with a chapter by Kari Mõttõlä that places OSCE efforts to develop a model for "a common and comprehensive security" into the larger European security landscape. Chapter 2, penned by veteran OSCE analyst Arie Bloed, provides an overview of the OSCE's main political bodies. Bloed's especially strong contribution could easily serve as an introduction for those not well versed in "OSCE-speak." His piece ably integrates descriptions of the OSCE as it exists on paper with explanations of how the OSCE works in practice. Berthold Meyer's contribution (chapter 3) on dispute settlement procedures outlines the spectrum of mechanisms and procedures that have evolved in the OSCE since (roughly) 1990.

In chapters 4–6, Merja Pentikäinen, María Amor Martín Estébanez, and Allan Rosas and Timo Lahelma write on (respectively) the OSCE human dimension, the High Commissioner on National Minorities, and the OSCE long-term missions. Each of the authors presents a clear analysis of the innovative and (in the case of the missions) largely ad hoc approaches to conflict prevention, management and resolution that have become the trademark of OSCE operations.

Chapter 7, by Andrea Gioia, has somewhat more general coverage than the other chapters. In this piece, the author considers the relationship between the United Nations and regional organizations; the OSCE falls within the category of "regional organizations," but the OSCE per se is not the central focus of his inquiry. Still, it helps set the scene for chapters 8–12 by, in order, Ronzitti, Lamberto Zannier, Ettore Greco, Gianluca Burci and Fabrizio Pagani, all of whom address various aspects of (potential) OSCE peacekeeping. In the following five chapters, the editors move on to examine the extent to which the OSCE has adopted more traditional peaceful settlement of disputes (PSD) instruments. Torsten Lohmann contributed two chapters (13 and 16) to this group, one of which surveys PSD mechanisms and another which focuses on conciliation in particular. Michael Bothe (chapter 14) sets the OSCE PSD mechanisms into the context of general international law and practice and concludes that "OSCE dispute procedures are not really innovative. . . . What is really special about the CSCE/OSCE procedures is that a part of them is not based on an international treaty, but on political commitments" (p. 379). Lucius Cafilisch (chapter 15) discusses the OSCE Court of

Conciliation and Arbitration, identifying a number of questions left open by the treaty establishing the Court. Susanne Jacobi (chapter 17) describes the way in which the principle of subsidiarity with respect to other dispute settlement procedures stands to limit recourse to three of the four "formalized" PSD procedures of the OSCE (p. 425).

Chapters 18 and 19, by Rexane Dehdashti on Nagorno-Karabakh and Mario Sica on the OSCE's role in the former Yugoslavia since the Dayton Accords, provide welcome case studies, illustrating the strengths and weaknesses of the OSCE's conflict management and resolution efforts. Chapter 20, "The OSCE Mediterranean Dimension" by Roberto Aliboni, is an interesting exploration of issues weaving together the European states, the so-called Mediterranean (North African) countries and the OSCE, but is rather loosely related to the overarching theme of this volume. In a final chapter, the editors deftly and concisely draw a number of insightful conclusions from the preceding twenty contributions.

Throughout this volume, the consensus decision-making rule is a recurring theme. Some authors describe the consensus requirement as a source of strength and an advantage for the OSCE (e.g., Bloed, p. 51; Burci, p. 303), while others portray it as a weakness that impedes the OSCE's abilities in the areas of peacekeeping and security (e.g., Mõttõlä, p. 30; Ronzitti, p. 249). In fact, the consensus requirement continues to be a subject of debate within the OSCE community. In the resolution adopted by the OSCE Parliamentary Assembly at its 1993 annual meeting in Helsinki, the assembly urged the Council of Ministers to adopt "a decision-making procedure which no longer requires consensus or 'consensus-minus-one.'" In subsequent Parliamentary Assembly resolutions, this idea was referred to as "approximate consensus," and the assembly further suggested that this new form of decision making could require agreement by OSCE states representing 90 percent both of membership and of financial contributions for a decision to be adopted. In light of the critical role consensus plays in all OSCE activities—for better or worse—a fuller discussion and more critical analysis of OSCE decision making would have been helpful.

One other aspect of this volume might have been usefully expanded. Although the editors state their intention to place the OSCE into "a political, institutional and legal (normative)

perspective," the discussion of the political context in which OSCE dispute resolution tools have developed is, in some places, a bit thin. In Meyer's account of the negotiations on peaceful settlement of disputes at the Valletta meeting in 1991, for example, it might have been helpful for the reader to see those deliberations in the context of some of the actual disputes that formed the backdrop of the negotiations. Thus, it was arguably relevant that just one day before the Valletta meeting opened, Soviet military forces were killing civilians in Riga and Vilnius as part of a last-ditch effort to quash resurgent Baltic independence; on the very day the Valletta meeting opened, the United States and other allies acting under Security Council authorization began bombing Iraq in response to its aggression against Kuwait; and throughout the meeting, disputes between Turkey and Greece, Turkey and Cyprus, Liechtenstein and Czechoslovakia, and Hungary and Romania—among others—influenced negotiators' positions. Greater appreciation of the various national political concerns explains why many of the more traditional tools discussed in this book (notably OSCE peacekeeping and the formalized peaceful settlement of disputes procedures) remain completely untested, while other ad hoc and somewhat nontraditional approaches are so favored by the OSCE participating states. For example, the case studies by Dehcashti and Sica and Greco's chapter on peacekeeping in the CIS area, among other chapters, give considerable insight into the political realities facing the OSCE community.

While an ample body of literature examines the CSCE/OSCE in its earlier years, relatively little has been written about its more recent history. *The OSCE in the Maintenance of Peace and Security* provides, in a single text, a substantial body of well-researched, carefully documented and clearly presented information about the informal and formal procedures used by the OSCE participating states in the field of conflict prevention, management and resolution.

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*Human Rights, Culture and Context: Anthropological Perspectives.* Edited by Richard A. Wilson. London, Chicago: Pluto Press, 1997. Index. £40.

Since the American Anthropological Association's 1947 statement to the United Nations on human rights calling for respect for cultural differences and recognition of the limited applicability of any human rights declaration, an uneasy relationship has existed between anthropology and international human rights law. Often anthropologists and human rights advocates have found themselves poised on opposite sides of the cultural versus universal debate. This debate pits law against culture, with law representing the universalization of liberal individual rights, and culture suggesting the protection of local essentialized group norms and traditions. Those familiar with the legal literature on international human rights know that the law-culture divide is not so clear, and that, in fact, few human rights advocates take a position even close to that suggested by the dichotomy. This collection of essays, edited by Richard Wilson, a lecturer in social anthropology at the University of Sussex, suggests that anthropologists also do not readily accept this dichotomy. In fact, as trends in the discipline of anthropology have moved away from—indeed critiqued—the tendency of some modern anthropology to essentialize culture, anthropologists have begun to approach human rights law differently.

As part of a project to rethink international human rights law and discourse, Wilson's book attempts to push anthropologists (and presumably human rights law activists and scholars) beyond the cultural-universal divide by examining how human rights discourse is actually deployed by various individuals and groups. Regardless of its intended audience, this methodological enterprise has as much potential for international law as for anthropology because of its use of ethnography as a tool for understanding the effects of international legal discourse at the local level. In my view, Wilson correctly identifies human rights as "claims for powers by competing social groups" that "are continually transformed as the result of struggles over political, symbolic or economic resources within a state and transnational context" (p. 17). Understood in this way, a study of the discourse of human rights can provide keen insights into the underlying struggles that get played out as debates in various settings and

\* The views and opinions expressed are those of the reviewer and do not necessarily represent those of the Commission on Security and Cooperation in Europe.

communities over "rights." Indeed, Wilson suggests that anthropology might engage in a more lasting critique (and transformation) of human rights activism by investigating its impact on such struggles than by standing outside the field expressing disdain for the "universal" values of human rights.

That said, this collection is a bit uneven in accomplishing the project Wilson identifies. The book comprises seven essays written by anthropologists, including one by Wilson himself, as well as a lengthy introduction by Wilson. Although Wilson does not discuss the role of geography in his study, it seems no accident that three of the seven chapters focus on Guatemala, where Wilson has done fieldwork. Of the remaining chapters, one focuses on native groups in Hawaii, one on indigenous groups in Mexico, and one on Mauritius. Another chapter offers a postcolonial critique of Western definitions of torture, with no particular geographical focus. Although each of the chapters does, to some degree, explore the deployment of human rights discourse at the local level, the book reveals significant differences among the approaches taken by the authors. Perhaps because he uses the pieces in the collection to make an argument, Wilson does not identify these differences. In this review, I hope to underscore those differences and to identify the understandings of law and culture that they reflect.

Wilson's introduction is followed by two ethnographic pieces. In the first, *Legal Pluralism and Transnational Culture: The Ka Ho'okolonui Kanaka Maoli Tribunal, Hawai'i, 1993*, Sally Engle Merry describes an ad hoc tribunal organized by a pro-sovereignty group in Hawaii in which the Kanaka Maoli Nation sued the U.S. Government. The Nation charged the United States with appropriating the resources and destroying the culture of the Kanaka Maoli people in violation of Kanaka Maoli, United States and international law. In the second essay, *Multiculturalism, Individualism and Human Rights: Romanticism, the Enlightenment and Lessons from Mauritius*, Thomas Hylland Eriksen studies the process of interethnic compromise in Mauritius, which he considers a "weak" multicultural society.

Both of these pieces argue against an easy rejection of human rights law by anthropologists or others who might argue that such law cannot accommodate cultural differences. They do so, however, in very different ways. Merry uses the tribunal as one of many examples of

how indigenous groups have begun to use the language and law of human rights in their struggles. Importantly for Merry, by using this discourse as a site for political resistance, indigenous groups have "reinterpret[ed] and transform[ed] Western law in accordance with their own local legal conceptions" (p. 29). One cannot simply be for or against human rights when seen in this way; its meaning is constantly shifting as it accommodates various cultures and practices. If Merry identifies human rights as a site for the intersection of the cultural and political, Eriksen aims to keep the two distinct. For him, Mauritius has been successful as a polyethnic society because it permits differences in cultural and religious practices, while adopting "universalist principles" for its political culture: "In so far as discrepant religious or otherwise cultural practices do not interfere with the universalism guaranteeing individuals equal rights, there is no good reason to chastise them" (p. 61). In other words, when culture seems to conflict with individual rights, culture loses.

Both Merry and Eriksen explicitly address the tension they identify between rights and culture, but they find different means by which to mediate it. In doing so, however, they both tend to romanticize the societies they study. It seems unlikely that the Kanaka Maoli has consciously and subversively appropriated human rights discourse or that Mauritius has so easily and clearly reached the compromise that Eriksen describes. Still, of the two approaches, I am most sympathetic to Merry's understanding of the interpenetration of politics and culture. Whether done consciously or not, the continued appropriation of international law by those who have traditionally been subjugated by it might well have the potential for liberal, if not radical, reform.

In the next essay in the book, *Liberalism, Socio-Economic Rights and the Politics of Identity: From Moral Economy to Indigenous Rights*, John Gledhill seems to share Eriksen's disdain for "strong multiculturalism," or what Gledhill calls "identity politics." Gledhill uses recent conflicts in Chiapas, Mexico, to put forth a class-based critique of the dominant liberal defense of capitalist welfarism. Linking (a bit too quickly in my mind) a defense of welfare rights to identity politics, he then ambitiously critiques such disparate thinkers as Hayek, Locke, Rawls and Rorty before even moving to the discussion of Chiapas. Focusing on the existence of widespread poverty, including within what Rawls

and Rorty might consider liberal states, Gledhill attributes the rise of indigenous identity assertions (as opposed to those of national identity) to the "continuing nondelivery of socio-economic fairness" (p. 91). He then engages in a critique of indigenous identity similar to the class-based argument against affirmative action advanced in the United States. That is, he argues against "special" rights for indigenous persons in part because "[p]oor whites may see themselves as equally deserving of additional sources of income" (p. 95). Moreover, he argues against the essentializing tendencies of indigenous rights advocates, pointing to the indeterminacy of the classification "indigenous peoples." As if writing a direct response to Merry, Gledhill points out that, in the nineteenth century, some indigenous groups in Mexico aimed at appropriating liberal language for their own purposes. Although doing so might have had some advantages, "it also brought down repression when they tried to implement their model 'on the ground' in a way which resisted the long-term social project of the liberal elite" (p. 98). As for the future, "[t]y appropriating an identity which is a product of a colonial situation, Mexico's *etnias* can make their collective voice a more powerful one . . . but there is a price to be paid" (p. 104). Instead of these efforts by indigenous groups, Gledhill would prefer to see direct action by a coalition of the "working poor," a classification he does not challenge.

Thus, the first three essays in the book can be seen as critical defenses of human rights law. For Eriksen and Gledhill, the argument is for individual rights over ethnic or cultural identity, at least in what they consider the political realm. Merry, on the other hand, seems to applaud the appropriation of human rights law and discourse by those who were formerly its victims.

The last four essays in the book seem to go in a different direction. They are largely aimed at human rights activists and are critical of the inability of nongovernmental or intergovernmental organizations to attend to the context in which human rights violations occur. One of these pieces is a postcolonial critique of the "Western" definition of "cruel, inhuman and degrading treatment." The last three essays are about contemporary Guatemala. Although the focuses of the Guatemala pieces differ, they work in tandem to critique much of the role

that mainstream (outside) human rights organizations have played in the country in the past two decades.

Talal Asad's *On Torture, or Cruel, Inhuman and Degrading Treatment* provides a provocative critique of colonial definitions of suffering and torture, and their continuing legacy in the Universal Declaration of Human Rights' prohibition of "cruel, inhuman or degrading treatment or punishment." Arguing that colonists sought the end of what they considered gratuitous suffering among the colonized, while inflicting suffering necessary to the project of colonization, Asad demonstrates how that viewpoint has played out in modern understandings of both public and private torture and punishment. Asad concludes by pointing to what he considers an inconsistency in modern Western thinking about the infliction of pain by arguing that the same individuals who condemn "fanatical commitment[s] to outmoded beliefs" abroad (p. 127) often defend sadomasochism in the West as protected private activity among consenting adults. Although this argument is intriguing and bold, it takes away from the overall persuasiveness of the piece by suggesting widespread approval for sadomasochism in the West (which I have not seen in the United States at least), and rejection of unspecified practices abroad (the only example that he offers of the latter are Shia Muslim flagellants mourning the martyrdom of the Prophet's grandson). Nevertheless, the postcolonial critical method of the piece makes an important contribution to Wilson's project, particularly in its call for more ethnographies of pain and cruelty.

The final three essays include Wilson's *Representing Human Rights Violations: Social Contexts and Subjectivities*, Jennifer Schirmer's *Universal and Sustainable Human Rights? Special Tribunals in Guatemala*, and David Stoll's *To Whom Should We Listen? Human Rights Activism in Two Guatemalan Land Disputes*. All continue two threads begun by Asad: they criticize Euro-American human rights activists and they express skepticism about law, particularly international human rights law. Yet, while Asad exposes the instability and contextuality of human rights law (as does Merry), the final essays seem to assume that the law is rigid and incapable of taking context into account. It is with this last assumption that I take issue.

Wilson's piece is the most critical of the three. He engages in a literary analysis of human rights reports, focusing primarily on hu-

man rights accounts of the murder of an anthropologist in Guatemala. Adding narratives about the anthropologist's life that were excluded from the reports, Wilson uses this case to argue that most human rights reports are "individualised, a-cultural, deracinated and therefore universalistic" (p. 157). Like Asad, he calls for the use of ethnography to contextualize accounts of human rights abuses.

Schirmer and Stoll criticize particular positions that human rights activists have taken in Guatemala, positions that the activists presumably would not have taken had they attended to the political context in which human rights discourse occurs. Schirmer questions whether the elimination of the infamous Guatemalan Special Tribunals, advocated and applauded by human rights advocates, was in fact a victory for human rights. She argues that abolishing the tribunals merely drove the execution and punishment of political prisoners underground, where many more political prisoners were assassinated or disappeared than under the tribunals. Stoll criticizes the position taken by human rights activists (*internacionalistas*) in a complicated postwar land dispute between formerly displaced and newly arrived residents. For Stoll, the *internacionalistas* fail to address the complexities of the situation by accepting the left's argument as the pro-human-rights position. Stoll argues that a desire to protect human rights in Guatemala does not necessarily lead to any given position in the dispute. He does so, in part, by demonstrating that the guerrillas have also engaged in human rights violations. He concludes that "exalting certain groups of peasants as victims, while reducing the claims of others to army manipulation, overlooks the complexities of a civil war and can alienate peasants from the human rights movement" (p. 209).

Each of these three authors, then, offers a significant critique of foreign international human rights activity in Guatemala. Wilson and Stoll call for increased attention to the complexities of political struggles and critique the tendency of human rights activism to divide the participants of a conflict into victims and victimizers. Schirmer calls for human rights activists to recognize the potentially deadly consequences of a focus on the formal legal system. Although each of the Guatemala pieces engages in persuasive criticism, they all tend to have a rigid understanding of law. Schirmer and Stoll, for example, both suggest that activists are mis-

appropriating—"looting" for Schirmer—human rights law and discourse. In making this argument, they assume that the law is, and should somehow remain, pure and neutral. Given their focus on context, this stance is surprising. But while Schirmer and Stoll would like to purify law, Wilson seems ready to abandon it altogether. The difficulty with human rights reporting, for him, is that it is legalistic. He assumes that law requires decontextualized reporting. Indeed, in the end he directs his argument "towards social researchers, since human rights organisations will probably be committed to a legalistic framework at least for the foreseeable future" (p. 157).

As a lawyer, I find this conclusion by Wilson disappointing. The promise of his collection lies in its ability to apply ethnographic tools and contemporary anthropological understandings about culture to law. But cross-disciplinary work requires more than simple importation. Just as this book could help lawyers better understand the conflicts among anthropologists over the meaning and significance of culture, so might it also increase the awareness of anthropologists about debates in law over the meaning of rights. If not all anthropologists reify culture, not all lawyers reify rights. Perhaps in this sense, Merry's work comes closest to bringing together the critical strands in both law and anthropology. This collection provides a good beginning to a needed conversation. I would like to see it continue.

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*From Soviet to Russian International Law: Studies in Continuity and Change.* By George Ginsburgs. The Hague, Boston, London: Martinus Nijhoff Publishers, 1998. Pp. xi, 414. Index. Fl 235; \$134; £80.

In the late 1980s, political leaders and jurists in the Soviet Union embarked on a program to employ international law as both a primary means of furthering interstate cooperation and a source of norms to advance reform of the domestic legal system. In this monograph, George Ginsburgs, a professor of foreign and comparative law at the Rutgers University School of Law and a leading authority on the practice of international law in the Soviet Union and post-Soviet Russia, seeks to assess the progress of these efforts a decade later.

The volume is not intended to serve as a comprehensive study or a description of the place of international law in the Russian Federation. Instead, in order to examine up to January 1997 the extent of practical implementation of the Russian leadership's international law initiative (which this reviewer will call the "new internationalism"), the author presents four case studies (or Scenes, as he calls them) on discrete topics, which he has chosen because they represent major departures from law and policy in the pre-Gorbachev Soviet Union.

Scene 1 is a book in itself. Of the four case studies, it is the most complex and the broadest in scope, addressing a range of difficult doctrinal and practice issues associated with the effort under the new internationalism to incorporate international law into Russia's domestic legal system. The author's narrative weaves together three components of this process: the adaptation of the domestic legal system's textual base, exemplified by widespread insertion of references to international norms in legislative acts, inclusion in the 1993 Constitution of provisions for the transformation of international norms, and enactment of the 1995 Law on the International Treaties of the Russian Federation; application of this textual stock by administrative agencies and the courts; and dialogue among legal scholars as to the new internationalism's doctrinal foundation. Among the topics addressed in the ongoing doctrinal discussions are the ranking of international human rights norms and the Constitution itself in the legal hierarchy, the identification of those international agreements that require parliamentary approval, the recognition and place of self-executing treaties, and the status of treaties in Russia's complex federal structure.

Scene 1 is characterized by insightful commentary on many of these issues. Two sections struck this reviewer as particularly illuminating: (1) the author's analysis of the relative merits of the various categories of legislative references to international norms; and (2) his detailed examination of the implementation of commitments made pursuant to Russia's entry into the Council of Europe, a matter that has taken on added significance with Russia's 1998 ratification of the European Convention on Human Rights. In addition, the author's identification throughout scene 1 of various indicators for assessment of the degree of international norm transformation—incorporation in legislative acts, direct or indirect application by the courts

in concrete cases, systematic application by administrative agencies, further efforts at treaty negotiation and formulation—is very helpful.

The author's overall assessment of Russia's efforts is that the evidentiary record sends a mixed message. He concludes that implementation of the new internationalism has fallen far short of the aspirations codified in the legislative effort. He offers a pessimistic appraisal for future prospects, but acknowledges that evidence of progress exists for those observers inclined to be optimists. His conclusions are based on the presence of extralegal conditions, such as Russia's chronic budgetary shortfalls, and more general observations about the absence of adherence to legality in Russia's institutional culture, as well as what he calls "environmental factors," such as the insufficient training of judges, legal officials, police and private attorneys in international law. He suggests that the latter factors account for the infrequent invocation of international norms at the subordinate levels of the judicial and administrative hierarchies (p. 121).

Scene 1 is written primarily for specialists in Russian law, which is in keeping with the fact that the book is a publication in the Law in Eastern Europe series of the Institute of East European Law and Russian Studies at the Leiden University Faculty of Law. Readers should be aware that the author assumes a considerable degree of familiarity with the texts, institutions and issues addressed. Despite being targeted at a specialized audience, however, scene 1 will be of interest to all international lawyers, who will find much that is familiar in the questions of doctrine and implementation with which Russia is grappling.

Unfortunately, the author's message does not come through easily. Although the technical analysis of doctrinal questions in scene 1 sparkles, it is not user-friendly, and its value is diminished by methodological, organizational and editorial problems. One concern arises out of the author's selection and use of source materials. His narrative operates on at least two levels: his own analysis of relevant constitutional and legislative texts and his heavy reliance, particularly for evidence of implementation, on publications of Russian jurists. Often, the statements of these secondary sources are culled from the transcripts of scholarly conferences. As to the former, the reader would be in a better position to follow the author's detailed examination of issues arising under particular



provisions of the Constitution (pp. 59–89) if the texts themselves were made accessible to the reader. Instead, either they are not provided or information regarding their substance is found only at the conclusion of the author's discussion of them. As to the secondary sources, they are at times used deftly to portray doctrinal evolution. However, one must question the author's reliance on them to present factual assertions on the matter of practical implementation when primary sources (such as actions of the Russian Federation Constitutional and Supreme Courts) are available and when the reader is offered little information about the source or the possible existence of opposing points of view.

Compounding these difficulties are pervasive editing problems. Amid the author's extensive use of lengthy quotations to state important points, the reader frequently encounters an absence of citations. Further, in many places, the author's commentary and lengthy statements by secondary sources are woven together so tightly that it is impossible to determine whether the author or one of his sources is speaking.

Scenes 2–4 are linked by a common theme—the harnessing of international law to place interstate dispute resolution or cooperation on a legal footing in order to resolve certain potentially explosive problems, some of long standing, with Russia's neighbors. They differ considerably from scene 1 in style and methodological approach, offering a more straightforward descriptive narrative. The author employs a broader range of primary and secondary sources, resulting in richly detailed empirical studies of the specific questions addressed. These case studies provide considerably more background information than is found in scene 1 and do not assume a reader's prior knowledge of Russian law.

In scene 2, the longest section of these three, the author addresses questions of citizenship: both the potentially explosive issue of Russia's perceived need to afford some sort of legal protection to ethnic Russians residing in non-Russian successor states of the Soviet Union and Russia's treatment of aliens within its territory. On the first question, Ginsburgs examines the range of devices that Russia has employed, concentrating on its efforts to create rights of dual citizenship by means of treaties with other successor states of the Soviet Union, and concludes that those efforts comport well with international norms. At the same time, on the second

question, he points to considerable gaps or "slippage" between laws that liberally extend Russian citizenship and their often ineffective implementation. A primary obstacle in this regard is the tenacity with which registration authorities have clung to the *propiska* (residence permit) as a prerequisite for recognition of Russian citizenship (while at the same time citizenship is required for issuance of such a permit), despite a series of court decisions invalidating the use of the *propiska*.

Scene 3 discusses the negotiations initiated in the 1980s and agreements concluded in the 1990s to resolve Russia's long-standing boundary disputes with China. Ginsburgs offers a positive assessment of the resultant legal arrangements, which in his view have the potential to serve the interests of both sides and are consistent with international norms. At the same time, he is concerned about these arrangements' vulnerability to extralegal geopolitical, psychological and emotional factors that could be destabilizing (pp. 331–32).

Scene 4, which discusses cooperation with China in policing crime, focuses on the analysis of two Russian-Chinese agreements—the 1992 Treaty of Legal Assistance and the 1995 Treaty of Rendition—and assesses their implications not only for the joint efforts, but also for the administration of justice at home. The discussion concludes on a cautionary note, suggesting that cooperation on measures such as extradition will prompt Russia to overlook alleged deficiencies in China's observance of international norms in criminal law and procedure.

Despite the abundant material presented, the presentation in scenes 2–4 contains some of the same organizational and editorial problems that beset scene 1. For example, in scene 3, the actual title of the important agreement signed by the USSR in 1991 and ratified by its Russian successor in 1992 is never cited, leading to considerable confusion when the author seeks to refer to it in the midst of discussing related negotiations and agreements.

This reviewer finds little to question in respect to the author's primary message: that a daunting series of institutional and cultural obstacles stands in the way of effective implementation of the new internationalism. It would have been helpful, however, if the volume, which lacks a general conclusion, had included an effort to identify and examine common elements in the four case studies. A more systematic examination of the indicators used to assess

the progress of the new internationalism, for example, might be of considerable benefit not only for the author's Russian audience but also for jurists and officials in other countries that have embarked on the same path. Meanwhile, the volume suggests a number of intriguing questions that may stimulate further study, including the identification and ranking of prerequisites for effective transformation of international norms into domestic legal systems, consideration of the extent of congruity between the goals of using international law as a vehicle for interstate cooperation and domestic legal reform, and examination of the degree of suitability of the latter goal for Russia, with its long history of sporadic efforts at "top-down" reform.

These considerations suggest that this volume, despite its shortcomings, makes a valuable contribution to the study of international and constitutional law in Russia through both the wealth of information it provides and its insights into the formulation and implementation of particular policies and doctrines. Moreover, the author's examination of the Russian experience in defining the relationship between international law and the domestic legal system should be particularly stimulating and useful for the comparative study of this subject in other countries.

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*La Giurisprudenza italiana di diritto internazionale pubblico. Vol. II, Repertorio 1987-1997.* Edited by Paolo Picone. Naples: Jovene Editore, 1997. Pp. xx, 943. Indices. Lit 165,000.

This volume collects decisions rendered by Italian courts during the period 1987-1997 in the field of public international law. A previous volume, covering the period 1960-1987, was edited by Benedetto Conforti and Paolo Picone and published in 1988.

An alphabetical list of important international law subjects forms the basis for organizing the materials in this volume. Each subject entry in this book includes portions of each relevant decision by way of excerpts or summaries. As a consequence, decisions that relate to different subjects are included in more than one location. References to all of the journals where the full text of each judgment is published are duly given. Although the volume

does not provide English translations or summaries, there is an index in English that should help the non-Italian reader find the entries in which decisions relating to specific matters are located.

In this volume, Mr. Picone, a professor of international law at the University of Naples, excluded all cases that relate to the interpretation of provisions of European Community law, which can be considered a legal system in itself, formally distinct from both international law and the domestic legal system. Nonetheless, decisions relating to general aspects of European Community law and its implementation in the Italian legal system still constitute a great part of the volume's materials, confirming the pervasive character of the process of European integration and its progressive erosion of national sovereignty. The editor could have further reduced the selection of those European materials. The consequence would have been to focus the reader's attention on cases dealing with issues of general public international law rather than specialized European regional law. The same could be said of the decision to include many cases dealing with treaties relating to conflicts of law and jurisdiction.

The book does not contain explicit comments on the decisions, although a careful reader will find the editor's implicit questioning of certain decisions in at least three "[sic!]"s he has noted after particular decisions (pp. 772, 852 and 857). If I had to place my own "[sic!]"s, I would also have singled out two other decisions: the judgment, rendered by the Constitutional Court on February 24, 1992, which finds that the 1966 International Covenant on Civil and Political Rights "has not been ratified by a sufficient number of States to become effective as a multilateral treaty" (p. 706), and the judgment by the Tribunal of Siena of February 9, 1993, which reports that China is a signatory to the 1950 Rome Convention for the Protection of Human Rights and Fundamental Freedoms, the so-called European Convention on Human Rights (p. 910).

The collected materials leave a general impression that certain theoretical problems of the relationship between different kinds of rules are still unsettled or have been solved by the Italian courts in an unsatisfactory way. In fact, for obvious reasons, the Italian Constitution, which was adopted in 1947 and has never been amended, does not address the place of European Community law in the hierarchy of

Italian law. Less understandable is the fact that the Italian Constitution does not expressly provide for the place of treaties in Italian internal law. This omission may have led some Italian courts to questionable undervaluations of the role of international treaty law in Italian domestic law; an example is the strange theory advanced by some courts that treaties are mere programs (especially applied to treaties on human rights or the protection of the environment). Furthermore, the role of Italy's regions and of regional competence in the implementation of international legal obligations is also a question that has given rise to different interpretations.

Another troublesome subject area concerns the Italian courts' treatment of the immunity granted to foreign states and international organizations sued by Italians employed by their embassies, consulates or offices. According to a theory elaborated by several Italian courts, immunity must be granted if the employee performed an activity aimed at achieving the public objectives of the state or organization, but immunity must not be granted if the employee was engaged in merely mechanical or manual labor. As can be expected, this view has produced a plethora of cases involving librarians, cooks, typists, drivers, interpreters, telephone operators, and so forth that have resulted in differing decisions on the immunity issues despite their apparent similarities.

Some decisions reported in the volume reflect particularly careful and balanced approaches to difficult problems of international law. For example, the Tribunal of Vicenza decision of February 11, 1991 (p. 640), decided that the allied action against Iraq in the Persian Gulf was authorized by Article 51 rather than Article 42 of the Charter of the United Nations. Again, the Court of Cassation, in its decision of

April 4, 1990 (p. 260), broadly interpreted the 1926 Slavery Convention when it decided that compelling a child to steal is tantamount to subjecting the child to slavery.

But perhaps the most interesting decisions in the volume are the two decisions in the case of the ship *Fidelio*—Court of Appeal of Palermo, June 30, 1992 (p. 154), and the Court of Cassation, February 1, 1993 (p. 712); a third decision on the case; Tribunal of Palermo, November 7, 1988, was not published in this book. A ship flying the flag of Honduras and carrying about six tons of hashish, corresponding to more than 14 million doses, was seized by the Italian police on the high seas at a location eighty nautical miles from the Italian coast en route from various eastern Mediterranean ports to an unknown destination. The public prosecutor, Giovanni Falcone, who was later killed by the Mafia, tried to persuade the judges that the seizure of the ship, although made on the high seas, and the subsequent conviction of the traffickers were legal. However, all three courts concurred that no criminal jurisdiction could be exercised with respect to a foreign ship seized on the high seas, despite its being engaged in large-scale drug trafficking.

The editor and his collaborators (P. Toriello, E. Cortese Pinto, C. Focarelli, and R. de Rosa) must be congratulated on producing a very useful collection that, as the editor appears to promise in the foreword, will be updated periodically. The volume not only will enable practitioners to find the precedents and determine the trends that Italian courts are likely to follow, but also will provide scholars with guidance on how international rules are applied in a specific country, such as Italy.

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## COLLECTED ESSAYS

*African Yearbook of International Law. Annuaire Africain de droit international*, 1997 (Vol. 5). Edited by Abdulqawi A. Yusuf. London, The Hague, Boston: Kluwer Law International, 1998. Pp. ix, 410. Index. Fl 295; \$159; £100.

Alioune Blondin Beye, *Le processus de rétablissement et de maintien de la paix en Angola*; Alexandros Yanniss, *State Collapse and Prospects for Polit-*

*ical Reconstruction and Democratic Governance in Somalia*; Angèle N. Makombo, *Civil Conflict in the Great Lakes Region: The Issue of Nationality of the Banyarwanda in the Democratic Republic of Congo*; Khoti Kamanga, *The Rwandan Conflict and the Genocide Convention: Implications for Tanzania*; Mohammed Bedjaoui and Fatsah Ouguergouz, *Le forum prorogatum devant la Cour internationale de Justice: les ressources d'une institution ou la*

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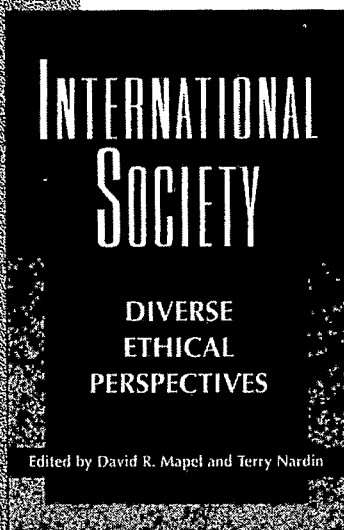
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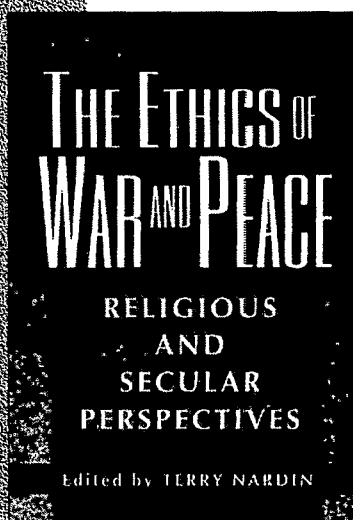
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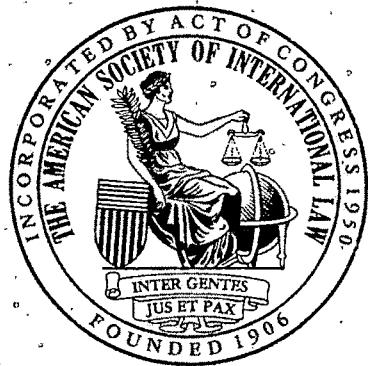
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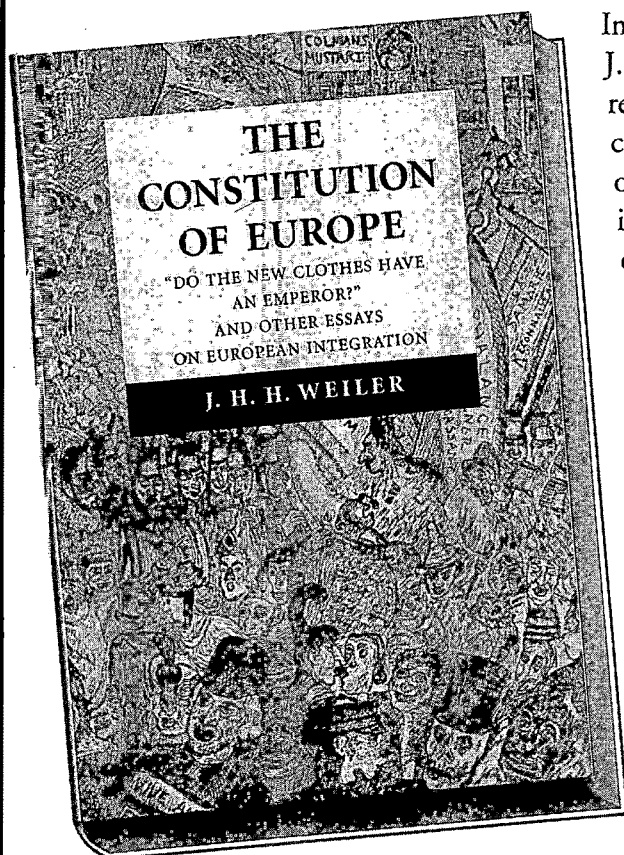
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### INDEXES CARRYING *AJIL*

The *American Journal of International Law* is included in: ABC POL SCI: A Bibliography of Contents: Political Science and Government; Current Law Index; IBR—International Bibliography of Book Reviews of Scholarly Literature; IBZ—International Bibliography of Periodical Literature; Index to Foreign Legal Periodicals; Index to Legal Periodicals; International Political Science Abstracts; Public International Law: A Current Bibliography of Books and Articles; Social Sciences Index.

## SYMPOSIUM ON METHOD IN INTERNATIONAL LAW

### APPRAISING THE METHODS OF INTERNATIONAL LAW: A PROSPECTUS FOR READERS

In 1908 the second volume of the *American Journal of International Law* featured a piece by Lassa Oppenheim entitled *The Science of International Law: Its Tasks and Method*. Oppenheim began his article by noting, apparently with some approval, that the first volume of *AJIL*, stacked with articles only by Americans, had "shown to the world that America is able to foster the science of international law without being dependent upon the assistance of foreign contributors."<sup>1</sup> Concerned, however, that students were "at first frequently quite helpless for want of method [and] mostly plunge into their work without a proper knowledge of the task of our science, without knowing how to make use of the assertions of authorities, and without the proper views for the valuation and appreciation of the material at hand," Oppenheim sought to bring "the task and the method of this our science into discussion in this Journal."<sup>2</sup> What followed was a comprehensive exposition of his views on the purposes of international law and the methods available to lawyers and scholars for approaching the problems they face.

In the nine decades since that article appeared, the hundreds of articles published in the *Journal* have revealed the two fundamental transformations in our field: first, the susceptibility of new areas of international affairs to treatment through international norms and institutions; and second, theoretical innovations leading to new ways of thinking about each of these issue areas. Indeed, these two developments are inseparable. As Ronald St. J. Macdonald and Douglas M. Johnston wrote in their introduction to a significant and weighty volume of theoretical essays on international law fifteen years ago, a focus on theory is increasingly needed in a field such as ours that has been driven to great degrees of both specialization and fragmentation.<sup>3</sup> The need for an understanding of overarching constructs linking the various subdisciplines within international law seems even greater today, as we have moved, it seems, from the establishment of new international law journals by law schools around the world to a proliferation of specialized international law journals and very specialized international lawyers. For beneath the surface of much scholarship by our authors and those in other periodicals are a host of unanswered questions about presuppositions, conceptions and missions, all of which influence how they undertake their analyses of an issue and how they arrive at conclusions and recommendations for decision makers. Hence the timeliness of this symposium on method in international law.<sup>4</sup>

The term "method" as we use it here, however, requires a bit more refinement. Many authors have used the term, but with the assumption that the reader would know what was meant. For Oppenheim, "method" was intimately associated with his view that international law was a science that had its own unique and rigorous approach to

<sup>1</sup> Lassa Oppenheim, *The Science of International Law: Its Tasks and Method*, 2 *AJIL* 313, 313 (1908).

<sup>2</sup> *Id.* at 313, 314.

<sup>3</sup> See Ronald St. J. Macdonald & Douglas M. Johnston, *International Legal Theory: New Frontiers of the Discipline*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 1, 3 (Ronald St. J. Macdonald & Douglas M. Johnston eds., 1983).

<sup>4</sup> The *AJIL* is not the first periodical of its kind to embrace the need for such an understanding. Our friends at the *European Journal of International Law* stated at the time of its founding a decade ago that they would devote pages to the intellectual legacies of the great European scholars, and their collections of essays on Friedmann, Verdross, Lauterpacht and Kelsen have been exemplary in this regard.

analyzing and solving questions—in the words of the *Oxford English Dictionary*, “a special form of procedure adopted in any branch of mental activity, whether for the purpose of teaching and exposition, or for that of investigation and inquiry.”<sup>5</sup> This scientific link between method and international law can be found in the thinking of other great scholars of an earlier era. Hans Kelsen spoke in his 1932 Hague lectures and his 1940–1941 Oliver Wendell Holmes lectures of the “technique of international law,” which would fulfill the purposes of the law but which could not itself be understood or undertaken without an underlying theory.<sup>6</sup> In a profoundly important attack on the positivist method in this *Journal* in 1940, Hans Morgenthau spoke of the need to “reexamine the methodological assumptions with which the traditional science of international law starts” and to “reconcile the science of international law and its subject-matter.”<sup>7</sup> For Philip Allott, the methods employed by various international lawyers refer to the structure of their argumentation, in particular its logical discourse.<sup>8</sup>

The scientific leanings of the earlier writers aside, most of these scholars seem to be speaking roughly of the same idea: the application of a conceptual apparatus or framework—a theory of international law—to the concrete problems faced in the international community. This idea of method, which we adopt for this symposium, is thus distinctly different from abstract theories of international law that explain the nature of international law but are devoid of application to particular problems.<sup>9</sup> We focus here not on the coherence of a particular theory for explaining the foundations or traits of international law, but on its relevance for lawyers and legal scholars facing contemporary issues. At the same time, method is far broader than a methodology of legal research in the sense of ways to identify and locate primary and secondary resources.<sup>10</sup>

The link between a legal theory and a legal method is thus one between the abstract and the applied.<sup>11</sup> By organizing a symposium on method, we seek to provide a greater grasp of the major theories of international law currently shared by scholars, but to view these theories in the most direct way—by seeing how they establish what the law is, where it might be going, what it should be, why it is the way it is, where the scholar and practitioner fit in, how to construct law-based options for the future, and whether it even matters to ask those questions. A method used by a writer on international law may correspond to one theory of international law or to more than one if an author chooses

<sup>5</sup> 9 OXFORD ENGLISH DICTIONARY 690 (2d ed. 1989).

<sup>6</sup> According to Kelsen:

[U]ne analyse juridique rigoureuse est indispensable pour atteindre l'amélioration si désirable de la *technique du droit international*. C'est justement pour remplir cette tâche de la politique du droit qu'une *théorie pure* du droit est nécessaire, de même qu'il n'y a pas de médecine scientifique sans biologie, pas de technique sans physique.

Hans Kelsen, *Théorie Générale du Droit International Public: Problèmes Choisis*, 42 RECUEIL DES COURS 117, 122 (1932 F.). See also HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 82–122 (1942). For a trenchant analysis, see David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 38–40.

<sup>7</sup> Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 24 AJIL 260, 261 (1940). See also Samuel J. Astorino, *The Impact of Sociological Jurisprudence on International Law in the Inter-War Period: The American Experience*, 34 DUQ. L. REV. 277 (1996).

<sup>8</sup> Philip Allott, *Language, Method and the Nature of International Law*, 45 BRIT. Y.B. INT'L L. 79 (1971).

<sup>9</sup> For one theory that nonetheless disguises itself as a method, see MARTIN BOS, A METHODOLOGY OF INTERNATIONAL LAW (1984); and *id.* at 2 (“methodology . . . in fact is a phenomenology”).

<sup>10</sup> See, e.g., SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW (1984).

<sup>11</sup> The distinction between a legal theory—the conceptual framework—and a legal method is not the same as the distinction between “theory” and “practice.” At least one of the methods presented in this symposium rejects such a distinction on the ground that “theory is practice” and vice versa. Its point is rather that a method entails the *application* of more abstract concepts to more concrete problems.

to apply different theories. It is also possible to imagine that a theory of international law created or posited by a particular writer may yet have no methodological counterpart in that its creator or supporters have not yet developed, or never did develop, a construct for approaching concrete problems.

#### DISCERNING METHODS TO APPRAISE

To elucidate the theoretical underpinnings of contemporary scholarship through recourse to the methods employed by various theories, we decided upon seven methods for appraisal: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics. In our view, they represent the major methods of international legal scholarship today. Our list does not include methods that may have been utilized by scholars in the past, or that dominated the scholarship of earlier eras—as the absence of Roman law, canon law, and socialist/Soviet law would indicate. It also excludes, owing to space constraints, other approaches that offer important insights, such as natural law, the comparative method<sup>12</sup> and functionalism.<sup>13</sup> Moreover, our identification of seven discrete methods does not preclude other useful ways of grouping international legal scholarship. Macdonald and Johnston, for instance, spoke of three orientations: philosophical (Kelsen, Verdross and Verzijl), humanistic (Brierly, Lauterpacht and Jenks) and scientific (Schwarzenberger, Friedmann and Stone).<sup>14</sup> More recently, various scholars, including two contributors to this symposium, have identified themselves as part of a “New Stream” of international legal scholarship, to be distinguished from the mainstream, itself composed of several approaches.<sup>15</sup>

As the contributors to this symposium will present their respective methods in some detail, here we simply identify their most basic characteristics. We confess that these are purely our own descriptions, informed by our own perspectives, with which the authors may differ.

*Positivism.* Positivism summarizes a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations.<sup>16</sup> For positivists, international law is no more or less than the rules to which states have agreed through treaties, custom, and perhaps other forms of consent.<sup>17</sup> In the absence of such evidence of the will of states, positivists will assume that states remain at liberty to undertake whatever actions they please. Positivism also tends to view states as the only subjects of international law, thereby discounting the role of nonstate actors. It remains the lingua franca of most international lawyers, especially in continental Europe.

*New Haven School (policy-oriented jurisprudence).* Established by Harold Lasswell and Myres McDougal of Yale Law School beginning in the mid-1940s, the New Haven School eschews positivism's formal method of searching for rules as well as the concept of law as

<sup>12</sup> See W. E. Butler, *Comparative Approaches to International Law*, 190 RECUEIL DES COURS 9 (1985 I).

<sup>13</sup> See Douglas M. Johnston, *Functionalism in the Theory of International Law*, 26 CAN. Y.B. INT'L L. 3 (1988).

<sup>14</sup> Macdonald & Johnston, *supra* note 3, at 4.

<sup>15</sup> See Deborah Z. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 NORDIC J. INT'L L. 341 & n.3 (1996) (components of mainstream scholarship are “realist (Schwarzenberger, Weil, Watson), classicist (Fitzmaurice), and liberal-humanitarian (Henkin, McDougall [sic], Falk)"); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 131–91 (1989) (four schools are the “rule-approach position” (Schwarzenberger as paradigm), the “policy-approach position” (McDougal), the “skeptical position” (Morgenthau), and the “idealistic position” (Alvarez)).

<sup>16</sup> See HILAIRE MCCOUBREY & NIGEL D. WHITE, *TEXTBOOK ON JURISPRUDENCE* 11 (2d ed. 1996).

<sup>17</sup> See HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 438–39 (Robert W. Tucker ed., 2d. rev. ed. 1966).

based on rules alone. It describes itself as a policy-oriented perspective, viewing international law as a process of decision making by which various actors in the world community clarify and implement their common interests in accordance with their expectations of appropriate processes and of effectiveness in controlling behavior.<sup>18</sup> Perhaps the New Haven School's greatest contribution has been its emphasis on both what actors say and what they do.

*International legal process.* International legal process (ILP) refers to the approach first developed by Abram Chayes, Thomas Ehrlich and Andreas Lowenfeld at Harvard Law School in the 1960s. Building on the American legal process school, it has seen the key locus of inquiry of international law as the role of law in constraining decision makers and affecting the course of international affairs.<sup>19</sup> Legal process theory has recently enjoyed a domestic revival, which seeks to underpin precepts about process with a set of normative values. Some ILP scholars are following suit.

*Critical legal studies.* Critical legal studies (CLS) scholars have sought to move beyond what constitutes law, or the relevance of law to policy, to focus on the contradictions, hypocrisies and failings of international legal discourse. The diverse group of scholars who often identify themselves as part of the "New Stream" have emphasized the importance of culture to legal development and offered a critical view of the progress of the law in its confrontations with state sovereignty. Like the deconstruction movement, which is the intellectual font of many of its ideas, critical legal studies has focused on the importance of language.

*International law and international relations.* IR/IL is a purposefully interdisciplinary approach that seeks to incorporate into international law the insights of international relations theory regarding the behavior of international actors. The most recent round of IR/IL scholarship seeks to draw on contemporary developments and strands in international relations theory, which is itself a relatively young discipline. The results are diverse, ranging from studies of compliance, to analyses of the stability and effectiveness of international institutions, to the ways that models of state conduct affect the content and subject of international rules.

*Feminist jurisprudence.* Feminist scholars of international law seek to examine how both legal norms and processes reflect the domination of men, and to reexamine and reform these norms and processes so as to take account of women.<sup>20</sup> Feminist jurisprudence has devoted particular attention to the shortcomings in the international protection of women's rights, but it has also asserted deeper structural challenges to international law, criticizing the way law is made and applied as insufficiently attentive to the role of women. Feminist jurisprudence has also taken an active advocacy role.

*Law and economics.* In its domestic incarnation, which has proved highly significant and enduring, law and economics has both a descriptive component that seeks to explain existing rules as reflecting the most economically efficient outcome, and a normative component that evaluates proposed changes in the law and urges adoption of those that maximize wealth. Game theory and public choice theory are often considered part of law and economics. In the international area, it has begun to address commercial and environmental issues.

<sup>18</sup> See, e.g., Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law Is Made*, in INTERNATIONAL LAW ESSAYS 355, 377 (Myres S. McDougal & W. Michael Reisman eds., 1981).

<sup>19</sup> ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS at xi (1968).

<sup>20</sup> See Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AJIL 613, 621 (1991).

Although, as will be clear from the essays that follow, each of these methods has its own defining characteristics, it is equally apparent that each is a *living* method, employed by a diverse community of scholars who help ensure its continual evolution. If positivism is simplistically termed the most conservative of the methods, it is safe to say that the positivist method of today might well have been unrecognizable to a lawyer one hundred years ago; if critical legal studies is in some sense the most radical of the methods in the questions it poses about the nature of international law, it too has undergone transformations since its arrival in scholarly circles in the 1980s. The essays can thus present only a snapshot of their method, with perhaps some sense of its path to date and future trajectory. Moreover, although many of the methods have a distinctly American origin, the community of scholars for nearly all of them is now global.

#### A HEURISTIC FOR UNDERSTANDING AND APPRAISING METHODS

In light of our approach to evaluating the impact of theories on the analysis of concrete problems in international law, we asked authors writing from each perspective to approach one contemporary issue—the same one for all of the authors—and apply their method to it. Many of these authors might normally draw on multiple theories and hence methods in analyzing a legal issue, but we asked them to stick as close as possible to one method. The results may seem a bit artificial or stylized in some cases, but readers should at least get a clear picture of each method. As for the issue that could demonstrate the power of seven different methods, we believed it needed to be one that was topical, but not so technical as to require special expertise by our readers.

Our choice—accepted by all our authors (though in the same sense that the Versailles Treaty was accepted by the Central Powers)—is the question of individual accountability for violations of human dignity committed in internal conflict, with respect to both the substantive law and the mechanisms for accountability. The issue is at the forefront of current debates within international human rights law, international humanitarian law, and international criminal law, with implications for the role of international organizations, principles of criminal jurisdiction, and incorporation of international law into domestic law. It is also central, in a very concrete way, to political transitions around the globe in which new governments are variously attempting to come to grips with their past. We offer the following sketch of the issue with the recognition that it is itself influenced, if not determined, by different methods.

Although international humanitarian law provides some basic protections for individuals during civil conflicts, most notably through common Article 3 of the four 1949 Geneva Conventions and Additional Protocol II of 1977,<sup>21</sup> none of these treaty provisions holds individuals, as opposed to states, accountable for violations. This position contrasts

<sup>21</sup> See, e.g., Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 3, 6 UST 3516, 75 UNTS 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 UNTS 609 [hereinafter Protocol II]. For instance, common Article 3 includes the following provision:

[T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [persons taking no active part in the hostilities]:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

with the provisions on interstate war in the Geneva Conventions (that is, all of the articles except for common Article 3) and Additional Protocol I of 1977; they not only contain more detailed protections for persons not involved in hostilities, but also list certain violations as "grave breaches" for which individuals are responsible and with respect to which states must extradite or prosecute all suspected offenders.<sup>22</sup> As for human rights law, the International Covenant on Civil and Political Rights<sup>23</sup> nowhere explicitly calls for punishment of individuals for violations of human rights. Other conventions—notably the 1948 Genocide Convention, the 1956 Slavery Convention, the 1973 Apartheid Convention and the 1984 Torture Convention<sup>24</sup>—do require states to prosecute, or extradite or prosecute, persons who have allegedly committed those offenses, but those treaties are limited only to those offenses, some of which, like genocide, are quite narrowly defined. Beyond treaty law, customary law has developed the notion of crimes against humanity. Under the principles first set forth in the Charter of the Nuremberg Tribunal,<sup>25</sup> individuals could be held accountable for—though states were not obligated to prosecute—large-scale or systematic attacks (murder, torture, extermination, deportation, forced labor, inhuman acts, and persecution) on civilian populations.

Prosecutions for these offenses were rare until recently; domestic cases mostly involved government prosecution of insurgents for sedition or other acts under domestic law, but both governments and insurgencies were generally unwilling to prosecute or punish their own personnel. Authority to exercise universal jurisdiction to prosecute these crimes was also uncertain; and states other than the territorial state generally abstained from undertaking any such prosecutions. The absence of a community desire to criminalize these acts also contributed to the opposition among states to an international criminal court that would undertake such prosecutions.

Developments in the last five or six years have focused renewed attention on these issues. In 1993 the Security Council gave the International Criminal Tribunal for the former Yugoslavia (ICTY) jurisdiction over various crimes committed in civil wars—namely genocide, crimes against humanity, and "violations of the laws or customs of war."<sup>26</sup> When the ICTY began to consider indictments that included as crimes certain violations of the laws or customs of war, it had to address the extent to which such violations were, in fact, crimes in internal conflicts so that the law would not apply

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

<sup>22</sup> See, e.g., the list in Geneva Convention IV, *supra* note 21, Art. 147:

wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

<sup>23</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

<sup>24</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 UST 3201, 266 UNTS 3; International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 UNTS 243; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

<sup>25</sup> Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279.

<sup>26</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. 3, UN Doc S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993).



retroactively to a defendant. The Tribunal's appellate chamber offered an answer in one of its most important decisions to date, the 1995 interlocutory appeal in the *Tadić* case.<sup>27</sup> In 1994 the Security Council gave the International Tribunal for Rwanda jurisdiction not only over genocide and crimes against humanity, but also over "serious violations" of common Article 3 and Protocol II, making such violations per se war crimes in the Rwanda context.<sup>28</sup>

In codification processes within the United Nations, the International Law Commission in 1996 completed its nearly half-decade-long project to draft a Code of Crimes against the Peace and Security of Mankind. The code designates as war crimes for internal conflicts a list of acts, taken principally from the Statute of the Rwanda Tribunal.<sup>29</sup> The states participating at Rome in July 1998 in the drafting of a statute for a permanent international criminal court included war crimes in internal conflicts in the court's jurisdiction.<sup>30</sup>

Outside the chambers and corridors of international organizations, accountability has assumed increased importance as a significant number of states have settled their civil wars and addressed the fate of those who committed atrocities during them. Moreover, authoritarian governments that committed the same type of abuses one finds in civil wars—often proclaiming that they were fighting a civil war against their opposition—have fallen in many states. The extent to which those governments hold individuals accountable for these abuses is of vital importance to the transition of these states to stable democracies. Some have chosen to prosecute; others have chosen pardon; others have established truth commissions or engaged in purges of those associated with the past regime. Many have not yet made a clear choice.<sup>31</sup> As a result, the scope of a duty to hold individuals accountable, criminally or otherwise, is now the object of significant attention by international bodies and domestic courts.<sup>32</sup> Academic debate on this issue is also rich.<sup>33</sup>

Lastly, the concept of universal jurisdiction to prosecute violations of human rights has lately received more attention from governments, victims and human rights advocates.

<sup>27</sup> Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-AR72 (Oct. 2, 1995) (majority opinion), *reprinted in* 35 ILM 32 (1996).

<sup>28</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, SC Res. 955, UN SCOR, 49th Sess., Res. & Dec., at 15, Art. 4, UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1602 (1994). Equally important, though less relevant for the symposium, the Statute of the Rwanda Tribunal defines crimes against humanity without any reference to armed conflict (interstate or internal) at all, thus confirming the severance of the nexus first included in the Charter of the International Military Tribunal at Nuremberg.

<sup>29</sup> Draft Code of Crimes against the Peace and Security of Mankind, Art. 20(f), *in* Report of the International Law Commission on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No. 10, at 14, 111-12, UN Doc. A/51/10 (1996). The future of the code remains quite uncertain in light of the codification of its key crimes in the statute of the international criminal court.

<sup>30</sup> Rome Statute of the International Criminal Court, July 17, 1998, Art. 8(c), (e), UN Doc. A/CONF.183/9\*, *reprinted in* 37 ILM 999 (1998).

<sup>31</sup> The definitive compilation of state practice in this area is the three-volume *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed., 1995). For a superlative account of the Eastern European experience, see TINA ROSENBERG, *THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM* (1995).

<sup>32</sup> See, e.g., Comments on Argentina, Report of the Human Rights Committee, UN GAOR, 50th Sess., Supp. No. 40, at 31, 32, paras. 153, 158, UN Doc. A/50/40 (1995); Velásquez-Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 174 (July 29, 1988); Azanian People's Organisation (AZAPO) v. President of the Republic of South Africa, 1996 (4) SA 671 (CC).

<sup>33</sup> Recent articles and books include Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 797 (1999); Juan E. Mendez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255 (1997); CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* (1996); Symposium, *Accountability for International Crime and Serious Violations of Fundamental Human Rights*, 59 LAW & CONTEMP. PROBS. 1 (1996); IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

Courts in Switzerland and Germany have prosecuted war criminals from Bosnia; Spanish courts are attempting to prosecute Argentine generals for their acts in the "dirty war," as well as General Pinochet; and the United States sought (in vain) to find countries with universal-jurisdiction statutes willing to carry out domestic trials of members of Cambodia's former Khmer Rouge regime.<sup>34</sup>

The result of these recent trends in the law (if they are, indeed, trends) is, alas, hardly complete clarity. Many questions remain unanswered. A few of the more obvious ones are: To what extent does customary law now hold individuals accountable for atrocities in civil wars? Is the difference in accountability for atrocities in interstate wars and acts in civil wars justifiable? Should all serious violations of human rights and humanitarian law be crimes? What obligations do states have to prosecute? What limitations are there upon a state's ability to prosecute foreigners for crimes committed abroad against other foreigners? What are the advantages and disadvantages of international versus domestic tribunals, or of war crimes trials versus nonprosecutorial mechanisms like truth commissions, civil suits and removal from office? In choosing this subject for our contributors, we also very much realize that the subject can be quite vast, and can encompass numerous issues both procedural and substantive. Yet that variety of legal problems will also, we hope, enable our contributors to focus their lens on the appropriate targets of scrutiny. Some subissues will be less amenable to a method, while others will be central. The contributions will speak for themselves in this regard.

#### THEMES AND VARIATIONS

After considering how best to provide a clear demonstration of the various methods through use of the above problem, we asked our authors to explicitly or implicitly address several core questions that help get to the essence and uniqueness of each of their methods:

1. What assumptions does your method make about the nature of international law?
2. Who are the decision makers under your method?
3. How does your approach address the distinction between *lex lata* and *lex ferenda*? Is it concerned with only one, both, or neither?
4. How does it factor in the traditional "sources" of law, i.e., prescriptive processes?
5. Is your method better at tackling some subject areas than others, both as regards the issue noted above and as compared to other subjects?
6. Why is your method better than others?

We realized that some authors might find these to be the wrong questions and choose not to answer some or all of them. We thus invited them to challenge the questions themselves, if they preferred, with an explanation of why our questions were objectionable. We also recognize that not all of these methods can neatly answer these questions. Our conclusion aims at bringing together and comparing the responses provided by our authors.

These questions, in turn, highlight several major themes worth considering by the reader. The first is the distinctiveness and independence of international law as a discipline for approaching questions of international relations—what David Kennedy calls "law's claim to special knowledge."<sup>35</sup> More specifically, we need to ask whether international law has one method, one that presumably distinguishes it from other fields,

<sup>34</sup> See, e.g., Andreas R. Ziegler, Case note, *In re G.*, 92 AJIL 78 (1998) (Mil. Trib. Division I, Switz., Apr. 18, 1997); Christoph J. M. Safferling, Case note, *Public Prosecutor v. Djajić*, 92 AJIL 528 (1998) (Sup. Ct. Bavaria May 25, 1997); Anthony De Palma, *Canadians Surprised by Proposal to Extradite Pol Pot*, N.Y. TIMES, June 24, 1997, at A10.

<sup>35</sup> Kennedy, *supra* note 6, at 39.

as Oppenheim so confidently held in 1908,<sup>36</sup> whether there are multiple methods, or whether, perhaps, there is no method unique to our field. The first view may seem antiquated, and indeed in contradiction to the very idea of a symposium considering seven distinct methods. But in appraising the six methods other than positivism, it is worth reflecting upon whether they are, in fact, legal methods, or interdisciplinary methods of the "law and (sociology, international relations, economics, postmodern literary theory)" variety: that is, do our nonpositivist authors seek to provide an alternative that can be recognized as a legal method, or a new method that combines legal and nonlegal aspects? Is it possible, indeed, that the use of analytic approaches from disciplines outside the law serves to rob these methods of any distinctive legal quality?

The contribution by the positivists, and indeed their critique of the other methods, suggests that they regard their method as offering such a distinctive—or, in the words of Hans Kelsen, "pure"—quality. Readers may find that some papers—the overtly interdisciplinary methods of IR/IL and law and economics—come close to accepting positivism's claim in this regard, but assert that their methods nonetheless offer critical intellectual tools for the sophisticated practitioner or scholar. Other papers—in particular, those of the New Haven School and international legal process—suggest that they accept the idea of a legal method but find positivism's version too confining for real-world lawyers involved in decision making. Still others from the more critical perspective—CLS and feminist jurisprudence—seem to find embedded in these very questions objectionable assumptions about the nature of law and hence a distinctively "legal" method.

In addition, lawyers often seek what we call rigor in legal analysis.<sup>37</sup> Do these methods enlighten us as to what such rigor entails? Methods built on injecting the theoretical insights of outside disciplines, such as IR/IL and law and economics, the reader will note, claim to bring more rigor into the study of atrocities in internal conflicts by explicitly and systematically treating aspects of the behavior of international actors that other methods either ignore or treat only in an ad hoc manner. Policy-oriented jurisprudence also claims to have constructed a theoretical architecture that promises the practitioner or scholar a method to dissect and rigorously appraise numerous variables. But the critical approaches might label these as suffering from an incomplete or artificial rigor, one that does not delve deep enough to discover the biases of those applying them. This leads to the broader question of whether, as suggested by CLS, each method has its own unique view of what constitutes rigor: for each method that claims its sequence of intellectual operations or its core factors for analysis (ranging from economic efficiency to the gendered nature of law) enhance rigor, other methods will proclaim that reliance on those factors actually reduces it by bringing in extraneous, even diversionary, variables.

A second and related question concerns the usefulness of these various methods to the practicing lawyer (whether in private, governmental or nongovernmental circles), as opposed to the academic analyst. To what extent are each of the methods helpful or necessary tools for actual decision makers, as opposed to those who have the luxury, as it were, to reflect on more comprehensively, and dissect, a particular issue? The proponents of most of the methods below will hasten to insist on their relevance—if not, indeed, indispensability—for the practitioner. But in what situations and arenas will and should practitioners use each method? Is one method better for the brief before the court, another for the internal memo (to a client or other decision maker), and still

<sup>36</sup> Oppenheim, *supra* note 1, at 333 ("the method to be applied by the science of international law can be no other than the positive method").

<sup>37</sup> For a classic explanation of legal reasoning in the domestic context, see EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949).

another for the lobbying document before the government or international organization? Some methods might be challenged by practitioners as substituting a focus on method for attention to substance. Is this a valid criticism?

In this context, the articles in this symposium force us to scrutinize not only the claims of relevance made by the authors, but also the readers' own prejudices regarding the methods, i.e., any certainties in our own minds of the irrelevance of certain methods to our work as lawyers. Can we accept the insights of these methods as shown by their treatment of the problem in this symposium, and yet reject their pertinence to and appropriateness for lawyering? For instance, lawyers may assume that law and economics arguments have no place before a court of law, but are best left for the legislature. Yet even the International Court of Justice has long considered economic efficiencies in its decision making in a key part of its caseload (the delimitation of the continental shelf),<sup>38</sup> so negative presuppositions about the "real world" use of certain methods may be unwarranted. In fact, the number and diversity of audiences and targets of legal claims and argumentation in the process of international law suggest, instead, the need to recognize that each method—however academic it may seem at first blush—can resonate in certain contexts.

A third major theme to consider for those who do not find themselves already attached to one particular method, and even for those who do, is how the methods relate to each other. Do they accept certain common premises? To what extent do they even apply the same lenses but simply use different terms for them? From one perspective, the brief introduction provided here already suggests that three pairs of the methods seem closely related: international law/international relations and law and economics (with their focus on rational behavior of actors); the New Haven School and international legal process (with their focus on the decision-making process itself); and critical legal studies and law and feminism (with their challenges to the identity of the decision makers and the logic of the process). But other linkages can be found, e.g., in the importance of unequal distribution of political power to the New Haven School, law and economics, and feminist jurisprudence. On the other hand, some of the methods seem to be speaking almost different languages from each other, with few shared assumptions about international law. The process that positivists see of states consenting to specific rules that determine the regime for accountability for civil war atrocities appears in many ways remote from the one that feminists see of men forcing through rules for their own benefit. Indeed, CLS challenges the notion of shared assumptions entirely, suggesting that they are merely the personal preferences of those employing the various methods.

This question of common features raises a second-order methodological question: namely, for the lawyer who is contemplating writing about a new subject—whether the legal issues associated with the space station, rights for indigenous peoples, or trends in the practice of recognition—is there some method by which she can decide which of the seven (or more) methods to employ? It may be enticing for the lawyer or scholar, seeing the insights offered by various methods, to pick and choose from each those aspects that sound most appealing. But such intellectual eclecticism may end up eating away at the core premises of each method, leaving a sort of bland gray instead. And again, the critical perspectives remind us of the need to ask whether a rational choice among the methods is even possible.<sup>39</sup>

Fourth, and finally, what do the existing methods and the directions in which they take legal inquiry suggest about the future of the field? Each of the methods we consider here (with the possible exception of international law and international relations) originated

<sup>38</sup> See, e.g., *North Sea Continental Shelf Cases* (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 51–52 (Feb. 20).

<sup>39</sup> Cf. KOSKENNIEMI, *supra* note 15, at 189–90 (stating that four modernist approaches are both mutually exclusive and incapable of offering a rational choice among them).

in an approach to domestic law. This, of course, reinforces the conceptual connections between international law and domestic law. But the movement from the domestic to the international has not followed one trajectory; the differences between the two arenas make one model of transposition too facile. International legal process, for instance, has not incorporated certain normative components of the domestic legal process method. Feminism has taken into account numerous actors not involved in domestic feminist jurisprudential debates, e.g., international organizations. CLS emerged on the international scene within a decade of its arrival in domestic circles, while law and economics has taken many more years to make this move. Is there some mapping operation to understand or predict the receptivity of our field to innovations in domestic law, or is it a matter of ad hoc individual initiative by certain scholars?

Moreover, one can ask if the origin of most of these methods in the domestic paradigm means that international lawyers must await new sources of thinking within domestic law before bringing new insights and methods to international law. Perhaps, instead, international legal scholarship can build upon the differences between international law and domestic law to create new methods of inquiry—methods that might, in a reversal of fortune, trickle down (or over) to our domestic law colleagues instead of the other way around. For example, can concepts of legitimacy or justice now advocated as lodestars for decision making in international law form the basis for a new method of international law?<sup>40</sup> (Such a method might inspire yet another take on the problem of accountability for civil war atrocities.)

But there may be limits here, too. The proliferation of new issues for consideration by international law does not in itself require new methods of international law, just methods sophisticated enough—or basic enough—to handle different subject areas. Critical legal studies, with its deconstructionist bent, may at times seem like the last method, if indeed its exponents are willing to regard it as a method. On the other hand, just as the predicted “end of history” has proved premature, so it may be that the end of new methods is not yet upon us. In that respect, some clarity in understanding the potentials and limitations of the principal methods currently employed may plant the seeds for new methodological projects that can invigorate our field.

Indeed, whether as regards the methods in this symposium or others that might develop, their uniquely international aspects point to the need for more overt appraisal of a new set of linkages between international law and domestic law. Specifically, the active debates throughout our field about incorporation of international norms in domestic law and decision making—whether regarding human rights, the environment, investment or intellectual property—seem to have a methodological analogue. Instead of just defensively asking why international law has not followed certain methodological paths taken in domestic jurisprudence, we can focus on how our own ways of thinking about the law might resonate more among domestic lawyers. This process of communication about method could convey important benefits to domestic lawyers in understanding the nature of international law and the content of its norms. For domestic law to appreciate and incorporate international law, it seems necessary for domestic lawyers to know how international lawyers think.

The essays that follow are presented in chronological order based on our sense of the sequence in which the methods were originally elaborated (with the recognition that dating a method of international law is no easier than dating the solidification of customary law): positivism, policy-oriented jurisprudence, international legal process,

<sup>40</sup> See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

critical legal studies, international law and international relations, feminist jurisprudence, and law and economics. We believe this order should provide readers with a sense of how the various methods did or did not represent reactions or responses to those methods already in use. It will also allow for consideration of whether there are any overarching trends in the development of new methods of international law, perhaps related to the increase in international issues addressed by our field over time, as well as the range of new actors participating in the process of international law. Finally, this order offers an important vantage point for comparing the elaboration of international law theory and domestic law theory.

Nevertheless, we underline our point above, that each method itself has evolved significantly since its original formulation. Moreover, we do not wish to suggest that international law has witnessed an inevitable march of progress in the development of new theories and methods. Indeed, approaching the essays in a completely different order will likely yield additional insights. An alternative the editors considered for this symposium and offer our readers is the following: positivism, critical legal studies, policy-oriented jurisprudence, international legal process, international law and international relations, law and economics, and feminist jurisprudence. The first two might be said to define the spectrum of methods; the next two, to attempt to find an accommodation between them; the following two, to try to sidestep the old debates by bringing in the insights of other disciplines; and the last one, to admit to a range of methodologies while maintaining a strong normative commitment.

Whichever order our readers choose, it is our hope that the essays that follow will clarify and ultimately stimulate debate and innovation concerning the lenses through which international lawyers see concrete problems and the tools they use to approach them.

STEVEN R. RATNER AND ANNE-MARIE SLAUGHTER\*

## THE RESPONSIBILITY OF INDIVIDUALS FOR HUMAN RIGHTS ABUSES IN INTERNAL CONFLICTS: A POSITIVIST VIEW

### I. INTRODUCTION: POSITIVISM AND HUMAN RIGHTS

When we were invited to contribute a positivist perspective to the present symposium, we did not know whether to regard this invitation as flattering or as an insult: does positivism not represent old-fashioned, conservative, continental European nineteenth-century views—naïve ideas of dead white males on the possibility of objectivity in law and morals? There is little we can do about being male and white, but we have certainly not seen ourselves as positivists of that kind. From the range of methodologies that the editors assembled, we could associate ourselves with several approaches just as much as with positivism. But in reflecting on our day-to-day legal work, we realized that, for better or for worse, we indeed employ the tools developed by the “positivist” tradition.

The applicability of humanitarian law to internal armed conflicts appears to us to be a good test case for the practical use of the methodologies chosen: On the one hand, the changing reality, in which international conflicts increasingly give way to internal violence, militates in favor of a concomitant change in the law. Our humanitarian instincts strongly demand that we treat the legal consequences of distinctions between interna-

\* Of the Board of Editors.

tional and internal conflicts, between wartime and peacetime atrocities, as irrelevant.<sup>1</sup> On the other hand, our professionalism does not allow us simply to follow this urge without regard to "international law as it is," as compared to "how it should be." Governments charged with violations of humanitarian law constantly remind us of that very difference, which seems so utterly out of place from a humanitarian standpoint. After all, it usually is governments we are dealing with when we present our views of "the law." In our view, it is precisely this need to get our legal message through to other people, especially representatives of states who might not share our individual moral or religious sensibilities, that constitutes one of the main reasons for the adoption of a positivist view of international law.

There is yet another reason why positivism and human rights sensibilities are not incompatible but complementary. The rules of criminal law, especially the principle *nullum crimen sine lege*, are also meant to protect the accused from arbitrary prosecution. Even though Article 15, paragraph 2 of the International Covenant on Civil and Political Rights allows the punishment of offenders for international crimes pursuant "to the general principles of law recognized by the community of nations," it expressly requires that those principles must have been in force "at the time when [the crime] was committed."<sup>2</sup> As Judge (then President) Cassese has put it: "[A] policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle *nullum crimen sine lege*."<sup>3</sup> Only so long as the prosecution of offenders accords with existing international criminal law is it defensible from the viewpoint of human rights law.

## II. "CLASSIC" POSITIVISM AND SOME MODIFICATIONS

"Positivism" is a label for a whole array of differing approaches to international legal theory.<sup>4</sup> We will limit ourselves to describing the main strands of a "classic view" and to some modern modifications. Further, we will try to draw some conclusions from the critiques of positivism voiced, inter alia, in the other contributions to this symposium. The result will be a modern and, we hope, enlightened view of positivism as the core of international legal discourse.

The main characteristic of the classic view is the association of law with an emanation of state will (voluntarism). Voluntarism requires the deduction of all norms from acts of state will: states create international norms by reaching consent on the content of a rule.<sup>5</sup> If a state later changes its mind, there must be another—this time nonconsensual—rule

<sup>1</sup> See the first decision of the appeals chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY):

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-AR72, para. 119 (Oct. 2, 1995), 35 ILM 32 (1996) [hereinafter *Tadić Interlocutory Appeal*]. See also Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237, 239, 240, 249 (1998).

<sup>2</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 15, 999 UNTS 171 [hereinafter ICCPR].

<sup>3</sup> Prosecutor v. Erdemović, Appeals Judgement, No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, para. 11, 111 ILR 386, 395 (Oct. 7, 1997). But see Joint Separate Opinion of Judges McDonald and Vohrah, para. 78, *id.* at 314.

<sup>4</sup> For a more detailed description, see Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUR. J. INT'L L. 305 (1993).

<sup>5</sup> See GEORG JELLINEK, *DIE RECHTLICHE NATUR DER STAATENVERTRÄGE* 2, 42-49, 56-58 (Vienna, Alfred Hölder 1880).

that prevents the state from unilaterally withdrawing its consent. The German positivist Heinrich Triepel thus based international law on the "collective will" of states instead of the individual will of each and every one of them.<sup>6</sup> The combination of positivism and voluntarism found its classic expression in the famous *Lotus* judgment of the Permanent Court of International Justice:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>7</sup>

From this viewpoint, the role of the lawyer is limited to interpreting the authentic will of the states concerned.

But one need not necessarily associate positivism with state voluntarism.<sup>8</sup> Positivism can also be understood as the strict separation of the law in force, as derived from formal sources that are part of a unified system of law, from nonlegal factors such as natural reason, moral principles and political ideologies.<sup>9</sup> For the modern representatives of analytical positivism, the unity of the legal system, embodied by the *Grundnorm* (basic norm)<sup>10</sup> or the "unity of primary and secondary sources,"<sup>11</sup> is more important than the emanation of law from concrete acts of will.

Let us then summarize the classic positivist perspective on law as follows: Law is regarded as a unified system of rules that, according to most variants, emanate from state will. This system of rules is an "objective" reality and needs to be distinguished from law "as it should be." Classic positivism demands rigorous tests for legal validity. Extralegal arguments, e.g., arguments that have no textual, systemic or historical basis, are deemed irrelevant to legal analysis; there is only hard law, no soft law.<sup>12</sup> For some, the unity of the legal system will provide one correct answer for any legal problem;<sup>13</sup> for others, even if law is "open-textured," it still provides determinate guidance for officials and individuals.<sup>14</sup>

<sup>6</sup> HEINRICH TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* 27-32, 79-87 (Leipzig, Hirschfeld 1899). Similarly, 1 LEESA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 21-22 (2d ed. 1912).

<sup>7</sup> S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 18 (Sept. 7).

<sup>8</sup> See Prosper Weil, *Le Droit international en quête de son identité*, 237 RECUEIL DES COURS 75-76 (1992 VI).

<sup>9</sup> See H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958); HANS Kelsen, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 1967) (1960) [hereinafter Kelsen, *PURE THEORY*]. According to Kelsen:

The Pure Theory of Law is a theory of positive law. . . .

. . . .

It is called a "pure" theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements.

HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 1 (2d rev. ed., Robert W. Tucker ed. 1967). For a naturalist response, see Lon L. Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630 (1958).

<sup>10</sup> See Kelsen, *PURE THEORY*, *supra* note 9, at 198-205, 211-14.

<sup>11</sup> Primary rules designate rules imposing obligations; secondary rules, as "rules of recognition, change and adjudication," relate to the creation, variation or violation of primary rules. H. L. A. Hart, *THE CONCEPT OF LAW* 75-99 (2d ed. 1994). According to Hart, however, international law lacks an "ultimate rule of recognition" and comprises primary rules only. *Id.* at 213-37.

<sup>12</sup> See Prosper Weil, *Towards Relative Normativity in International Law?* 77 AJIL 413, 414-18 (1983).

<sup>13</sup> See Kelsen, *PURE THEORY*, *supra* note 9, at 205-08.

<sup>14</sup> See Hart, *supra* note 11, at 135.



For international law, this implies that all norms derive their pedigree from one of the traditional sources of international law, custom and treaty.<sup>15</sup> Treaties embody the *express* consent of states, custom nothing but their *tacit* consent. The only relevant conduct is that of states seen as unitary actors. Treaties, including so-called *lawmaking treaties*—e.g., those creating new rules or changing old ones—are binding upon the contracting parties only. Whether habitual conduct of states amounts to legally binding custom is a question of objective determination of fact.<sup>16</sup>

### *The Critique of Positivism*

In this brief paper we cannot give a comprehensive account of the critique of positivism.<sup>17</sup> Instead, we will react to criticisms usually advanced against positivism, especially those voiced in this symposium, and modify classic positivism to address some of these concerns.

In her contribution to this symposium, Mary Ellen O'Connell makes the point that *process* constitutes an important element of legal analysis that complements the analysis of norms. In particular, she argues that "duly established decision makers should 'have the authority to develop new legal standards.'"<sup>18</sup> The power-conferring capacity of norms is not alien to positivists.<sup>19</sup> But positive law also sets substantive limits on any delegation of powers. If tribunals exceed the discretion inherent in the delegation, they act *ultra vires* and are prone to lose not only their legal authority but also their political influence.

The New Haven approach, by conflating law, political science and politics plain and simple, fails to provide the very guidance that real-life decision makers expect from their lawyers. The degree of abstraction of Siegfried Wiessner and Andrew Willard's contribution to this symposium<sup>20</sup> amply demonstrates this point. What a decision maker expects from her lawyer might not be conclusive guidance in the first place but, rather, clarification of the constraints placed on her by existing law. In addition, by not distinguishing clearly between norms and values, the New Haven approach ideologizes international law, which is all too often based on a minimal consensus on means and not on ends.<sup>21</sup> Nevertheless, writings following the New Haven approach may have considerable value for both the analysis of actual decision making and the formulation of policy proposals.

The same can be said, *mutatis mutandis*, about law and economics and international relations theory.<sup>22</sup> Without doubt, their contributions are powerful tools for policy analysis, lawmaking and research. But even where they claim to be more positivist than the positivists,<sup>23</sup> we have some difficulty in accepting their analysis as informed by existing law rather than policy considerations. Law and economics assumes that effectiveness is the main, if not the only, criterion for the interpretation and application of the

<sup>15</sup> See OPPENHEIM, *supra* note 6, at 22. For an analysis of the changes in subsequent editions of the treatise, see W. Michael Reisman, *Lassa Oppenheim's Nine Lives*, 19 YALE J. INT'L L. 255 (1994).

<sup>16</sup> See OPPENHEIM, *supra* note 6, at 22.

<sup>17</sup> For an extensive presentation of recent criticisms of positivism, see Joseph H. H. Weiler & Andreas L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?* 8 EUR. J. INT'L L. 545, 549–58 (1997), with further references.

<sup>18</sup> Mary Ellen O'Connell, *New International Legal Process*, 93 AJIL 334, 339 (1999).

<sup>19</sup> See HART, *supra* note 11, at 48–49, 79–80.

<sup>20</sup> Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AJIL 316 (1999).

<sup>21</sup> See TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 15–16, 49–50 (1983).

<sup>22</sup> See Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AJIL 361 (1999); Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AJIL 394 (1999) (both with further references).

<sup>23</sup> Dunoff & Trachtman, *supra* note 22, at 399.

law. Alas, this is not necessarily the case. And international relations theory is always in danger of conflating the analysis of norms with that of politics.

As far as critical and feminist approaches are concerned, it is obvious that the interpretation of law—as of any text—is subject to the individual preferences and political choices of the lawyer. But does this mean that the application of norms owes nothing to the rule and everything to the person of the interpreter? The everyday reality of international law bears little similarity to this dim picture. There is neither complete determinacy nor complete indeterminacy. Sound legal analysis will not hide the indeterminacy of the law and the creativity it takes to make sense of it, but will render the law accessible to scrutiny by others. There is no specific competence of the lawyer beyond the law itself. Thus, the lawyer must, as far as possible, openly distinguish between the “law in the books” and her personal prejudices or political motivations. There is a certain inward-looking tendency in both Martti Koskenniemi’s and Hilary Charlesworth’s contributions to this symposium.<sup>24</sup> Whereas the former does not even try to give an “operational” answer to the problem of how to deal with the perpetrators of human rights violations, the latter seems to dispense with neutrality and objectivity for the sake of a highly subjective analysis. We doubt, however, that such analysis will be helpful in the dialogue with decision makers because it does not appear compatible with the setting of general standards for human behavior—norms urgently needed to hold the perpetrators of crimes against women accountable under the rule of law. The impressive contribution of the feminist movement to the development of international criminal law during the last decade testifies to the transformative potential of the adaptation of positive law to meet women’s concerns.

### *A Defense of Modern Positivism*

Notwithstanding our skepticism regarding policy approaches to international law, the debate has demonstrated convincingly that law is not independent of its context, as an extreme positivism might suggest. Prosper Weil, one of the most vocal recent proponents of strict positivism in international law, has emphasized the proximity of positivism to political reality.<sup>25</sup> However, this reality is subject to change. On the international plane, the different branches of government are increasingly acting on their own behalf instead of through foreign ministries. Other actors than states are assuming growing importance: intergovernmental organizations, as well as nongovernmental organizations, global economic players and the global media.<sup>26</sup> If norm perception in the international sphere now focuses on the will of states less than previously, the sources of law, and the interpretive tools to understand them, will also have to change.

Modern textbooks recognize the need to widen the evidence of “state practice”: “The practice of states . . . embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic despatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere.”<sup>27</sup> Further, *opinio juris* may be deduced from the conclusion

<sup>24</sup> See Hilary Charlesworth, *Feminist Methods in International Law*, 93 AJIL 379 (1999); Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AJIL 351 (1999).

<sup>25</sup> Weil, *supra* note 12, at 441–42.

<sup>26</sup> For extensive treatment of these developments and their impact on international law, see THOMAS M. FARROW, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 1–6 (1995); Jonathan I. Charney, *Universal International Law*, 87 AJIL 524 (1993); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 REUEIL DES COURS 215 (1994 VI); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1995).

<sup>27</sup> 1 OPPENHEIM’S INTERNATIONAL LAW 26 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). Similarly, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 cmt. b (1987) [hereinafter

of treaties or voting records in international fora, up to the point where practice and *opinio juris* cannot be clearly distinguished from each other.<sup>28</sup> This allows for the rather rapid development of customary law. International institutions, in particular the International Law Commission established by the United Nations General Assembly, play an important role in the codification and progressive development of international law by treaties, which may evolve into customary law of universal scope.<sup>29</sup> Increasingly, general principles of international law establish themselves from the top down, as it were; that is, not by deduction from domestic law but by proclamation in international fora.<sup>30</sup> As to decisions of international tribunals, which in Article 38 of the Statute of the International Court of Justice are merely counted among the "subsidiary means for the determination of rules of law," their importance for the clarification of legal rules nowadays can hardly be overestimated. Judgments of municipal courts may not directly bind the state concerned but will constitute important evidence of custom and general principles as applied by state organs.<sup>31</sup> In the ways illustrated, modern positivism is able to adapt to new developments in international affairs, even if sometimes at the cost of the beauty of traditional theory—namely, its clarity and rigidity.

Relying on a positivist conception of law does not necessarily imply subscribing to the view that there is only one correct answer to any legal problem. Rather, it means that we do not give up the claim to normativity and the prescriptive force of law. In many cases, law does provide guidance regarding what to do or not to do. Only by being normative can law preserve a balance between its transformative force, which does not accept reality as it is, and its roots in social reality.<sup>32</sup> Maybe a decision maker will decide to disobey a rule—for whatever reason, moral or immoral, egoistic or altruistic, humanitarian or state-interested. But the lawyer's role is not to facilitate the decision maker's dilemma between law and politics (and, occasionally, between law and morals), but to clarify the legal side of things. Of course, the time when the claim of positive science to objective knowledge remained largely unchallenged is over, and there is no way back to yesterday's certainties behind the insights of critical theory, be it late- or postmodern. If we take the critique of positivism as a call for self-consciousness of one's own political, economic, religious, ethical, male or other bias, we do not object. But what we do reject is the step from criticism of positivism to arbitrariness or postmodern relativism.

In sum, enlightened positivism is identical neither with formalism nor with voluntarism. Both custom and general principles cannot simply be reduced to instances of state

RESTATEMENT]. See also *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14, 99–100, paras. 183–89 (June 27) [hereinafter *Nicaragua*].

<sup>28</sup> See *Nicaragua*, 1986 ICJ REP. at 98, para. 186; RESTATEMENT, *supra* note 27, §103(2)(d); ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT* §566 (1984).

<sup>29</sup> See RESTATEMENT, *supra* note 27, §102 cmts. *f, i*. On codification and the impact of international organizations on sources generally, see 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 45–52, 110–14; VERDROSS & SIMMA, *supra* note 28, §§589–96.

<sup>30</sup> See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 102–06 (1992); VERDROSS & SIMMA, *supra* note 28, §606. This development can be squared with the wording of Article 38 of the ICJ Statute, which requires only general international recognition of those principles, not their deduction from domestic law. Cf. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 36–37, 40 (limiting general principles to those applied *in foro domestico*, but emphasizing their role as independent source); RESTATEMENT, *supra* note 27, §102(1) (speaking of "rules . . . accepted as such by the international community of states . . . by derivation from general principles common to the major legal systems of the world") & reporters' note 7 (emphasizing the origin of general principles in domestic law). But cf. *id.* §701(c) (general principles as source of human rights law).

<sup>31</sup> See OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 41–42; RESTATEMENT, *supra* note 27, §103(2)(a), (b); VERDROSS & SIMMA, *supra* note 28, §§618–22.

<sup>32</sup> But cf. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* 8–50 (1989) (arguing that such balancing is impossible).

well. So-called soft law is an important device for the attribution of meaning to rules and for the perception of legal change. Moral and political considerations are not alien to law but part of it. However, formal sources remain the core of international legal discourse. Without them, there is no "law properly so-called." Only when linked to formal sources recognized as binding by the international community does law serve the decision maker in the search for a balance between idealism and realism, common values and ideological neutrality, apology and utopia.

### III. A TEST CASE FOR MODERN POSITIVISM

Let us now put the method to the test. A positivist approach to law is an ideal tool for stocktaking: where does "existing" law stand on the matter? Our analysis will demonstrate that, according to a modern positivist approach, humanitarian law does provide for individual responsibility for human rights violations.

#### *Individual Criminal Responsibility in Internal Conflicts*

Three main areas of criminality are to be explored in international humanitarian law: genocide, crimes against humanity, and "ordinary" war crimes. The criminal nature of the first is largely based on a multilateral convention; the second, more or less on customary law; and the third, on a delicate mixture of both. The law on war crimes and crimes against humanity currently finds itself in a process of progressive codification, including its applicability to internal conflicts.<sup>33</sup> In the field, one has to distinguish carefully between international obligations of states to try individuals and punish them for certain conduct on the basis of domestic criminal law—the so-called *delicta juris gentium*—and rules establishing individual criminal responsibility directly at the *international* level. Only in the latter case are we in the presence of individual responsibility of a truly international character.

*The obvious case: genocide.* Genocide constitutes the most obvious case of international criminal responsibility of individuals. According to Article II of the Genocide Convention,

genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>34</sup>

No distinctions are made between international and internal conflict, between war and peacetime. Article I obliges states parties to prevent and punish the crime. Article V calls for the enactment of domestic legislation making genocide a punishable offense and for effective penalties. Article VI allows for trials at both the national and the international levels and thereby establishes the truly *international* legal character of the crime. In addition, the definition of the crime and of the punishable acts in Article III is precise enough to be directly applicable. Some national laws

<sup>33</sup> See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, Art. 8, para. 2(c), (e), UN Doc. A/CONF.183/9\* (1998), reprinted in 37 ILM 1002 (1998) [hereinafter ICC statute].

<sup>34</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277 [hereinafter Genocide Convention]. It has been ratified by 124 states. See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL AS AT 31 DECEMBER 1997, at 85, UN Doc. ST/LEG/SER.E/16 (1998) [hereinafter MULTILATERAL TREATIES]. See also GA Res. 96 (I), UN GAOR, 1st Sess., pt. 2, at 1134, UN Doc. A/231 (1946).

implementing the Convention have reproduced the text almost literally.<sup>35</sup> For the states parties to the 1948 Convention, therefore, genocide is an international crime as a matter of treaty law.

By asserting that states parties only "confirm" the criminal character of genocide, Article I indicates that the Convention considers the criminalization of genocide as codification of existing law. To anchor individual responsibility for genocide in customary law, there must be practice and *opinio juris*. International practice on the prosecution of perpetrators can be found in both domestic and international trials of offenders. Trials involving the charge of genocide have been conducted both internationally and domestically, against individuals<sup>36</sup> and states,<sup>37</sup> especially since the end of the Cold War. *Opinio juris* concerning individual responsibility for genocide is widespread. The International Court of Justice has counted "elementary considerations of humanity" among the general principles of law, even if it did not expressly say so, and later affirmed that "the principles underlying the Convention are recognized by civilized nations as binding on States, even without any conventional obligation."<sup>38</sup> Thus, the traditional triad of sources clearly confirms that individual criminal responsibility for genocide is part and parcel of international law.<sup>39</sup>

*Crimes against humanity.* Crimes against humanity constitute a more difficult case as regards individual responsibility. They first appeared in the Nuremberg Charter, which limited their scope to crimes committed in armed conflicts.<sup>40</sup> At present, however,

<sup>35</sup> See, e.g., Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. No. 100-606, §2(a), 102 Stat. 3045 (1988) (codified at 18 U.S.C. §1091 (1994)); STRAFGESETZBUCH [StGB] §220 (FRG).

<sup>36</sup> For recent examples, see Prosecutor v. Akayesu, Judgment, No. ICTR-96-4-T (Sept. 2, 1998), available at Web site of the International Criminal Tribunal for Rwanda [hereinafter ICTR] <<http://www.un.org/ict/english/judgements/>>, summarized in 37 ILM 1399 (1998) [hereinafter Akayesu]; Prosecutor v. Kambanda, Judgment and Sentence, No. ICTR-97-23-S, para. 40 (Sept. 4, 1998), reprinted in 37 ILM 1411 (1998); Prosecutor v. Karadžić and Mladić, Review of the Indictment Pursuant to Rule 61, Nos. IT-95-5-R61, IT-95-18-R61, paras. 92-95 (July 11, 1996), 108 ILR 86, 133-36 (ICTY 1996). For national prosecutions, see STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 151-58 (1997); Catherine Cissé, *The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda*, 1 Y.B. INT'L HUMANITARIAN L. 161, 175-86 (1998); Carla J. Ferstman, *Domestic Trials for Genocide and Crimes Against Humanity: The Example of Rwanda*, 9 AFR. J. INT'L & COMP. L. 857 (1997); cf. Attorney-General v. Eichmann, 1965 Psakim Mehoziim 3, 36 ILR 5, 32-39 (D.C. Jm. 1961), *aff'd*, 16 Piskei Din 2003, 36 ILR 277, 297, 303 (S. Ct. Isr. 1962) (universal jurisdiction for genocide as crime against humanity); José Alejandro Consigli, *The Priebke Extradition Case before the Argentine Supreme Court*, 1 Y.B. INT'L HUMANITARIAN L. 341 (1998).

<sup>37</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), Preliminary Objections, 1996 ICJ REP. 595 (July 11) [hereinafter Application of Genocide Convention].

<sup>38</sup> Reservations to the Convention on Genocide, Advisory Opinion, 1951 ICJ REP. 15, 23 (May 28). See also Application of Genocide Convention, 1996 ICJ REP. at 615, para. 31; Corfu Channel (UK v. Alb.) (Merits), 1949 ICJ REP. 4, 22 (Apr. 9); Nicaragua, 1986 ICJ REP. at 114, paras. 218-20.

<sup>39</sup> For further examples, see ICTY Statute, Art. 4, in Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), annex, UN Doc. S/25704 (1993), reprinted in 32 ILM 1159, 1192 (1993) [hereinafter ICTY Report]; ICTR Statute, Art. 2, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), reprinted in 33 ILM 1602 (1994). See also RESTATEMENT, *supra* note 27, §702(a) (genocide as violation of customary law).

<sup>40</sup> See Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Art. 6(c), 59 Stat. 1544, 82 UNTS 279, 288 [hereinafter Nuremberg Charter].

*Crimes against humanity:* namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. (Interior emphasis added)

See also International Military Tribunal, Judgment, reprinted in 41 AJIL 172, 249 (1947) [hereinafter IMT Judgment]; Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg

either the Statute of the International Criminal Tribunal for the former Yugoslavia<sup>41</sup> nor the Statute of the International Criminal Tribunal for Rwanda demands a nexus to armed conflict.<sup>42</sup> Both the UN Secretary-General and ICTY jurisprudence rely on customary law to dispense with this requirement.<sup>43</sup> It is not easy to ascertain, however, where the *practice* element of custom is to be found in this regard. In *Tadić*, the ICTY appeals chamber referred to the trials pursuant to Control Council Law No. 10,<sup>44</sup> to the overall scope of the Genocide Convention, and to the Convention outlawing apartheid.<sup>45</sup> In addition, some domestic practice exists.<sup>46</sup> The universal acceptance of the Statutes of the Tribunals is itself an indication of *opinio juris* in this regard. Applying modern positivist criteria, one may conclude that sufficient practice and *opinio juris* are present for customary law to emerge.

"Ordinary" war crimes. The case for individual responsibility for war crimes committed in internal armed conflict is the most difficult one. This is largely due to the rather extensive threshold provisions of both the Geneva Conventions and the Additional Protocols thereto, which exclude internal conflicts from the scope of most of their provisions, including the regime of "grave breaches."<sup>47</sup> Common Article 3, which applies "[i]n the case of armed conflict not of an international character," does not contain any provision dealing with individual responsibility.

One cannot but deplore the high level of confusion about the meaning of the "grave breaches" provisions of the Geneva Conventions. These provisions merely refer to the obligation of the parties either to try or to extradite alleged criminals, *aut dedere aut*

Tribunal, GA Res. 95 (I), UN GAOR, 1st Sess., pt. 2, at 1144, UN Doc. A/236 (1946). For examples of national prosecutions, see *Fédération Nationale des Déportés et Internés Résistants et Patriotes v. Barbie*, 78 ILR 124 (Ess. crim. Fr. 1983-1985); *Eichmann*, 36 ILR at 48-49 (D.C. Jm.), 239-52 (S. Ct.); CRIM. C., R.S.C., ch. 30, §1 (3d Supp. 1985) (Can.); *Regina v. Finta*, [1994] 1 S.C.R. 701 (Can.), critically summarized in 90 AJIL 460 (1996).

<sup>41</sup> See ICTY Statute, *supra* note 39, Art. 5; SC Res. 827, para. 2, UN SCOR, 48th Sess., Res. & Dec., at 29, UN Doc. S/INF/49 (1993).

<sup>42</sup> ICTR Statute, *supra* note 39, Art. 3. See also the relevant ICTY and ICTR jurisprudence confirming the wording of the Statutes: *Tadić Interlocutory Appeal*, *supra* note 1, paras. 138-42; *Kambanda*, *supra* note 36, para. 4. For an account of the history of crimes against humanity, see *Prosecutor v. Tadić, Opinion and Judgement*, No. IT-94-1-T, paras. 618-23 (May 7, 1997), 112 ILR 1 [hereinafter *Tadić Judgement*]; Akayesu, *supra* note 36, §6.4.

<sup>43</sup> See *Tadić Interlocutory Appeal*, *supra* note 1, paras. 138-42; ICTY Report, *supra* note 39, para. 34.

<sup>44</sup> Control Council Law No. 10, Art. II(1)(c), CONTROL COUNCIL FOR GERMANY, OFFICIAL GAZETTE, Jan. 31, 1946, at 50 [hereinafter CCL'10]. See TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950-53).

<sup>45</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, Arts. 1-3, 1015 UNTS 243 [hereinafter *Apartheid Convention*]. As of December 31, 1997, the Convention was in force for 101 parties, but for none of the "Western" states. See MULTILATERAL TREATIES, *supra* note 34, at 167. See also Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, Art. I(b), 754 UNTS 73 [hereinafter *Convention on Statutory Limitations*]; ICC Statute, *supra* note 33, Art. 7, para. 1.

<sup>46</sup> See *Eichmann*, *supra* note 36, at 48-49 (D.C. Jm.) & 139 (S. Ct.); *Barbie*, *supra* note 40, at 136; David Turns, *War Crimes without War?* 7 AFR. J. INT'L & COMP. L. 825-26 (1995); and the references *supra* note 36. For national laws, see RATNER & ABRAMS, *supra* note 36, at 51-53.

<sup>47</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2, 6 UST 3114, 75 UNTS 31 [hereinafter *Geneva Convention I*]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, Art. 2, 6 UST 3217, 75 UNTS 85 [hereinafter *Geneva Convention II*]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 2, 6 UST 3316, 75 UNTS 135 [hereinafter *Geneva Convention III*]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 2, 6 UST 3516, 75 UNTS 287 [hereinafter *Geneva Convention IV*]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Art. 1, paras. 3, 4, 1125 UNTS 3 [hereinafter *Protocol I*]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, Art. 1, 1125 UNTS 609 [hereinafter *Protocol II*].

*judicare*.<sup>48</sup> They do not qualify grave breaches as crimes of a truly international character. Nor does Protocol II criminalize violations of the law of war in internal conflicts. However, an indication of the international character of the offenses is given by Article 85, paragraph 5 of Protocol I, according to which "grave breaches . . . shall be regarded as war crimes."<sup>49</sup> Grave breaches are also included in the jurisdiction of the ICTY.<sup>50</sup>

In *Tadić*, the ICTY appeals chamber applied four tests for the existence of an international crime: (1) the infringement of a rule of international humanitarian law, (2) the customary or treaty law character of the crime, (3) the "seriousness" of the violation of humanitarian law, and (4) the establishment of individual criminal responsibility by the rule in question.<sup>51</sup> Since not all of these elements are present in the Geneva Conventions, we have to resort to customary law following the Nuremberg precedent.<sup>52</sup> True, actual *state* practice is difficult to find here. Modern positivism as described above, however, considers the acceptance of the practice of *international* bodies by states, e.g., in the cases of the Yugoslavia and Rwanda Tribunals and the Nuremberg and Tokyo Tribunals, as establishing the required *opinio juris*.<sup>53</sup> By creating tribunals to punish offenders of humanitarian law, states have demonstrated that they regard violations of humanitarian law as punishable at the international level, and thus have added practice to the—scant—existing record. The same can be said of the "laws and customs of war," which the Hague Regulations partly codified<sup>54</sup> and which Article 3 of the ICTY Statute includes under the jurisdiction of the Tribunal.<sup>55</sup> Originally, none of these rules did contain penal provisions, but individuals have since been customarily punished for their violation.

But what about internal conflicts? As already mentioned, the Geneva Conventions and Protocols I and II do not include violations of common Article 3 (which deals with internal conflicts) in the regime of "grave breaches." There are different strategies to overcome this gap. However, not all of them are satisfactory from a positivist viewpoint.

A first device lies in a broad construction of the Conventions themselves: since the grave breaches provisions deal only with the obligation to try or extradite, they do not exclude the punishment of alleged offenders for infractions of common Article 3. Neither, however, do they provide *for* the punishment of infractions. Another opinion goes so far as to hold the grave breaches regime to be directly applicable to internal conflicts,<sup>56</sup> although this interpretation is difficult to reconcile with common Article 2. A

<sup>48</sup> See, *supra* note 47, Geneva Conventions I, Art. 49; II, Art. 50; III, Art. 129; IV, Art. 146; and Protocol I, Art. 85.

<sup>49</sup> The ICRC commentary implicitly equates war crimes punishable at an international level with grave breaches, see INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, paras. 3411–22, 3521–23 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

<sup>50</sup> ICTY Statute, *supra* note 39, Art. 2; ICTY Report, *supra* note 39, paras. 39, 40.

<sup>51</sup> *Tadić Interlocutory Appeal*, *supra* note 1, para. 94.

<sup>52</sup> See LAW REPORTS OF TRIALS OF WAR CRIMINALS (United Nations War Crimes Commission ed., 1947). For recent national prosecutions of war crimes, see, e.g., *In re G.* (Mil. Trib., Division 1, Switz., Apr. 18, 1997), summarized in 92 AJIL 78 (1998); Public Prosecutor v. Djajić, 3 St 20/96 (Sup. Ct. Bavaria May 23, 1997), excerpted in 1998 NEUE JURISTISCHE WOCHENSCHRIFT 392, summarized in 92 AJIL 528 (1998). See also U.S. War Crimes Act of 1996, Pub. L. No. 104-192, §2(a), 110 Stat. 2104 (codified at 18 U.S.C. §2441 (Supp. II 1996)). Before Nuremberg, war crimes were prosecuted nationally according to customary international law, see Rüdiger Wolfrum, *The Decentralized Prosecution of International Offences through National Courts*, in WAR CRIMES IN INTERNATIONAL LAW 233, 239 (Yoram Dinstein & Mala Tabory eds., 1996).

<sup>53</sup> There is ample evidence for the existence of such *opinio juris*. See, e.g., ICTY Statute, *supra* note 39, Art. 3; ICC statute, *supra* note 33, Art. 8.

<sup>54</sup> Annex to Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (3e sér.) 461. See IMT Judgment, *supra* note 40, at 218.

<sup>55</sup> See ICTY Report, *supra* note 39, para. 44.

<sup>56</sup> See *Tadić Interlocutory Appeal*, *supra* note 1, Separate Opinion of Judge Abi-Saab, 105 ILR at 537–38; THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, para. 1209 (Dieter Fleck ed., 1995). But see *Tadić Interlocutory Appeal*, *supra*, paras. 80–81.

second strategy consists in a broad construction of the "international" character of a conflict.<sup>57</sup> Even the indirect involvement of another country is said to "elevate" a conflict to the international level. But this reading contradicts the care with which states drafted the threshold provisions of both the Geneva Conventions and Protocols I and II, excluding any criminal provision from the law of internal armed conflict laid down in Protocol II.<sup>58</sup> According to a third strategy, the inclusion of common Article 3 of the Geneva Conventions within the jurisdiction of the ICTR,<sup>59</sup> established to cope with an essentially internal case of genocide, constitutes the culmination of a development of customary law that has criminalized the law of internal conflicts beyond the Geneva Conventions.<sup>60</sup> This view is very much in line with the American "customary law of human rights school," which mocks the very term *customary* because it almost completely excludes actual state practice from consideration.<sup>61</sup> Of course, the recent international practice of the Yugoslavia and Rwanda war crimes Tribunals might actually create the very practice missing from the so-called customary law of human rights.

Even if one follows one or another of these approaches, the criminal law status of violations of the law of war in internal conflict remains precarious. The Security Council cannot close this gap by fiat with a resolution, because it may establish a tribunal but not legislate—even though, of course, the creation of the Tribunals is important evidence of the *opinio juris* of the Council's members in that regard.<sup>62</sup> The ICTY appeals chamber has refused to consider infractions of common Article 3 of the Geneva Conventions as grave breaches, rightly regarding some military manuals and a U.S. brief as insufficient evidence of the existence of customary law.<sup>63</sup> But it did interpret violations of common Article 3 as violations of "the laws or customs of war" subject to its jurisdiction.<sup>64</sup>

Nevertheless, the state practice involved is anything but firm. We know of no case in which a national, let alone an international, tribunal prior to the ICTY's establishment has exercised jurisdiction over war crimes in internal conflicts irrespective of the nationality of the victim and the perpetrator.<sup>65</sup> On the other hand, the Tribunals create further international practice. Moreover, widespread acceptance of the jurisprudence of the Tribunals represents evidence that the punishment of perpetrators of offenses against international humanitarian law in internal conflicts is nowadays permitted by a general

<sup>57</sup> See *Tadić Judgment*, *supra* note 42, Separate Opinion of Judge McDonald; see also *Prosecutor v. Delalić*, Judgment, No. IT-96-21-T, paras. 230–34 (Nov. 16, 1998); *Prosecutor v. Rajić*, Review of Indictment Pursuant to Rule 61, No. IT-95-12-R61, para. 22 (Sept. 13, 1996), summarized in 91 AJIL 523 (1997); Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AJIL 236 (1998).

<sup>58</sup> Geneva Conventions, *supra* note 47, common Art. 2; Protocols I and II, *supra* note 47, Art. 1.

<sup>59</sup> ICTR Statute, *supra* note 39, Art. 4.

<sup>60</sup> See *Tadić Interlocutory Appeal*, *supra* note 1, paras. 128–34 (citing military manuals and Yugoslav law); *Delalić*, *supra* note 57, paras. 307–10; Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554, 553–65 (1995).

<sup>61</sup> For an extensive critique, see Simma & Alston, *supra* note 30. For a rather robust reply, see Richard B. Reich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 10–21 (1995–96). See also Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AJIL 238, 240 (1996).

<sup>62</sup> See *Delalić*, *supra* note 57, para. 417; ICTY Report, *supra* note 39, para. 29; Simma, *supra* note 26, para. 39. But see Bardo Fassbender, *UN Security Council Reform and the Right of Veto* 211–13 (1998).

<sup>63</sup> *Tadić Interlocutory Appeal*, *supra* note 1, paras. 79–84.

<sup>64</sup> *Id.*, paras. 86–137.

<sup>65</sup> See Michael Bothe, *War Crimes in Non-International Armed Conflicts*, in *WAR CRIMES IN INTERNATIONAL LAW*, *supra* note 52, at 293. The UN Secretary-General has been very outspoken in this regard: the Security Council "included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime." Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994), para. 12, UN Doc. S/1995/134. But see *Hayes*, *supra* note 36, §6.5; *Tadić Interlocutory Appeal*, *supra* note 1, paras. 128–37.



principle of law. In addition, the statute for an international criminal court provides a list of criminal offenses in internal conflict.<sup>66</sup> As a treaty, the statute may change or abrogate existing limitations in the relations of the parties *inter se*. Further, it might sooner or later be recognized as an expression of customary law or of general principles. But the statute is not yet in force and had been signed at the time of writing by only about eighty states.<sup>67</sup>

In the creation of custom, there is always an element of innovation. On the basis of a modern positivism—hence also taking into account the practice of international institutions and accepting as *opinio juris* the legal views expressed by states in international organizations—one can defend the ICTY jurisprudence and the Rwanda Statute on the basis of a combination of developing customary law and existing general principles. We therefore consider the introduction of individual responsibility for war crimes as an example of lawmaking in accordance with the traditional methods of law formation by treaty, custom and general principles.

*Other crimes.* Other crimes in both the humanitarian and the human rights fields may be established by way of treaties or customary law. There exists a whole array of offenses with quite varied characteristics. In the oldest case, that of piracy, every state was deemed to have the right to punish offenders.<sup>68</sup> Most special conventions impose obligations on states to try or extradite perpetrators.<sup>69</sup> Others also establish universal jurisdiction, even while leaving primary responsibility with the state where the crime was committed.<sup>70</sup> However, whether these treaties establish individual responsibility at the international level is doubtful.<sup>71</sup> A coherent and comprehensive international legal regime for the prosecution of individual violators of human rights does not exist.

### *The Institutional Dimension: Mechanisms of Accountability*

The rapid development of international criminal law following the establishment of the Yugoslavia and Rwanda Tribunals by the Security Council demonstrates that effective prosecution of war crimes requires the creation of mechanisms of implementation. At the same time, the need perceived by most states to create a permanent international criminal court by way of a convention demonstrates that the international community still regards codification by formal treaties as preferable to the application of essentially nonconventional law by instances *ad hoc*.

*International proceedings.* With regard to international jurisdiction for the prosecution of violations of humanitarian law in internal conflict, the statute of the future international criminal court, once universally ratified, will provide a sufficient legal basis. In addition,

<sup>66</sup> See ICC statute, *supra* note 33, Art. 8, para. 2(c).

<sup>67</sup> As of March 5, 1999, 77 states had signed the statute, and 1 had ratified it. See *Multilateral Treaties Deposited with the Secretary-General* (visited Mar. 9, 1999) <<http://www.un.org/Depts/Treaty/>>.

<sup>68</sup> See S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 70 (Sept. 7) (Moore, J., dissenting); 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 746–47. For a recent definition, see United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, Art. 101, UN Doc. A/CONF.62/122 & CORRS. 1–11, reprinted in UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983). For a skeptical view, see ALFRED P. RUBIN, THE LAW OF PIRACY 343–45 (1988).

<sup>69</sup> See, e.g., International Convention against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,081, 1316 UNTS 205; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 UST 1975, 1035 UNTS 167.

<sup>70</sup> See, e.g., Apartheid Convention, *supra* note 45, Arts. III–V (providing for international criminality, universal jurisdiction, and an international tribunal); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, Art. 5(2), 1465 UNTS 85 [hereinafter Torture Convention].

<sup>71</sup> For an argument in favor of characterizing torture as an international crime, see Prosecutor v. Furundžija, Judgement, No. IT-95-17/1-T, paras. 134–64 (Dec. 10, 1998); Delalić, *supra* note 57, paras. 446–77. Similarly, see RESTATEMENT, *supra* note 27, §103 reporters' note 7, §702(d).

the Security Council may respond to specific acts of genocide, crimes against humanity, and war crimes by creating further ad hoc tribunals. Furthermore, Article 90 of Protocol I establishes an International Fact-Finding Commission with the authority to investigate alleged offenses against humanitarian law and report the results of the investigation to the parties concerned.

*National judicial proceedings.* As regards national proceedings, the question of jurisdiction for human rights abuses has not yet been satisfactorily resolved. States remain just as reluctant to scrutinize the behavior of other states vis-à-vis the latter's own population as to bring their own leaders to justice.<sup>72</sup> Nevertheless, as evidenced by national trials, the establishment of universal jurisdiction for genocide and crimes against humanity, even if committed by aliens against aliens abroad, seems almost universally to be considered permissible, although the Genocide Convention is silent on the matter.<sup>73</sup> However, no treaty (yet) exists that obliges states to extradite or prosecute alleged offenders on charges of crimes against humanity. Universal jurisdiction for grave breaches of the Geneva Conventions seems to be increasingly accepted.<sup>74</sup> Treaties obliging states to try offenders and prosecute them for violations of human rights such as torture and forced disappearances expressly provide for universal jurisdiction only in some instances.<sup>75</sup> Effective national implementation remains central to the prosecution of alleged offenders.

Immunity has often shielded heads of state and government officials from prosecution even after they have left (or been removed from) office. This practice, however, runs counter to the stated purpose of international humanitarian law, i.e., to exclude certain criminal acts from the legitimate exercise of state functions.<sup>76</sup> It was therefore not recourse to natural law but respect for international law in force that guided the Appellate Committee of the House of Lords, which rejected Senator Augusto Pinochet's claim of immunity for torture allegedly committed while he was Chilean head of state.<sup>77</sup> The Law Lords also held that serving heads of state and government officials enjoy

<sup>72</sup> For an overview of recent national prosecutions, see RATNER & ABRAMS, *supra* note 36, at 146–56.

<sup>73</sup> See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985), *reprinted in* 79 ILR 535, 545–46; *Eichmann*, 56 ILR at 32–39 (D.C. Jm.), 297, 303 (S. Ct.); *Polyukhovich v. Australia*, 91 ILR 1, 39–51 (Brennan, J., dissenting), 119–32 (Toohey, J., concurring) (High Ct. Austl. 1991); *RESTATEMENT*, *supra* note 27, §404, cmt. a & reporters' note 1. For an overview of domestic laws, see RATNER & ABRAMS, *supra* note 36, at 156–58. For a law providing for universal jurisdiction for genocide, see, e.g., StGB §6, No. 1. *But see* U.S. Genocide Implementation Act of 1987, *supra* note 35 (limiting jurisdiction to offenses committed in the United States or cases where the alleged offender is a U.S. national); *Galinier v. Munyeshyaka*, 102 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 825 (1998), note Alland (Cass. crim. Fr. 1998) (universal jurisdiction for genocide limited to the former Yugoslavia and Rwanda).

<sup>74</sup> See Meron, *supra* note 60, at 564; L. R. Penna, *Criminal Sanctions for Violations of International Humanitarian Law*, in NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 73, 77–78 (Michael Bothe ed., 1990). Again, the U.S. War Crimes Act of 1996, *supra* note 52, is limited to cases in which the alleged offender or the victim is a U.S. national.

<sup>75</sup> See the Conventions cited *supra* note 69.

<sup>76</sup> See Nuremberg Charter, *supra* note 40, Art. 7; ICTY Statute, *supra* note 39, Art. 7(2); ICTR Statute, *supra* note 39, Art. 6(2); ICC statute, *supra* note 33, Art. 27. See also IMT Judgment, *supra* note 40, at 221.

<sup>77</sup> See *Regina v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1999] 2 W.L.R. 827 (H.L.) [hereinafter *Pinochet III*], which confirmed and reversed in part an earlier decision, *Regina v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1998] 3 W.L.R. 1456 (H.L.), *reprinted in* 37 ILM 1302 (1998) [hereinafter *Pinochet II*], vacated by *Regina v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1999] 2 W.L.R. 272 (H.L.), *reprinted in* 38 ILM 430 (1999) (because of the alleged bias of Lord Hoffmann). In the latest decision, the Law Lords decided by a 6–1 majority that the Torture Convention, *supra* note 70, excludes the invocation of immunity by former heads of state and by their home state on their behalf, provided that the Convention is in force for the states concerned. By holding that most of the charges against Senator Pinochet did not constitute extraditable crimes, the Lords avoided a general pronouncement to the effect that the invocation of immunity by former heads of state is excluded in all cases of international crimes, *Pinochet III*, *supra*, at 847 C (Lord Browne-Wilkinson). *But see id.* at 899 F (Lord Hutton), 913 H (Lord Millett), 924 F (Lord Phillips).

complete immunity from suit.<sup>78</sup> Before domestic tribunals, this may be justified by the personal character of the latter's immunity as opposed to that of former heads of state, which is derived from the immunity of states themselves and is therefore to be applied to official acts only. Often national officials are not prepared to prosecute violations of humanitarian law and human rights abroad. Also in this respect, Pinochet's arrest in Britain pursuant to an international warrant issued by a Spanish judge constitutes a remarkable precedent. Imprescriptibility of war crimes, crimes against humanity and genocide may be considered part of customary law.<sup>79</sup>

As far as civil suits are concerned, the U.S. example of allowing suits for alleged acts of torture<sup>80</sup> seems not to have been followed elsewhere. In many cases, the defendant, as a government or government official, will enjoy immunity from civil action. But this holds true only if one regards torture as an act committed in an official capacity.<sup>81</sup>

*Nonjudicial proceedings.* Truth commissions are in more and more frequent use.<sup>82</sup> Even if not expressly foreseen by general international law, they have been sponsored by the United Nations and several other governmental and nongovernmental organizations. Commissions of experts were precursors of both the Yugoslavia and the Rwanda Tribunals. Truth commissions combine the establishment of the truth about the past—a condition for peace—with the prospect of lasting political reconciliation. What they alone cannot achieve, however, is the prosecution of offenders or a judicial determination of responsibility. In view of the obligation to try or extradite, the granting of an amnesty, even in combination with the establishment of a truth commission, may well constitute a violation of international law.<sup>83</sup> In several instances, such as in Bosnia and Herzegovina, the prosecution of offenders of humanitarian law has been combined with amnesties for lesser crimes.<sup>84</sup> Article 6, paragraph 5 of Protocol II encourages the granting of amnesties in internal conflicts. Nevertheless, current international law does

<sup>78</sup> None of the Law Lords claimed that serving heads of state were subject to prosecution, *see, e.g., Pinochet III*, *supra* note 77, at 844 F (Lord Browne-Wilkinson), and *Pinochet I*, 37 ILM at 1334 (Lord Nicholls), 1336 (Lord Steyn).

<sup>79</sup> *See* Convention on Statutory Limitations, *supra* note 45; *Barbie*, *supra* note 40, at 132–41 (1984) (imprescriptibility of crimes against humanity, but not war crimes); Sergio Marchisio, *The Priebke Case before the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, 1 Y.B. INT'L HUMANITARIAN L. 344 (1998); Consigli, *supra* note 36. The objections of Western states to the Convention were merely due to the inclusion of apartheid.

<sup>80</sup> *See* Alien Tort Claims Act, 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. §1350 (1994)); Torture Victim Protection Act, 28 U.S.C. §1350 note (1994); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), 577 F.Supp. 860 (1984); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996), summarized in 90 AJIL 658 (1996).

<sup>81</sup> *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330–1332, 1391, 1441, 1602–1611 (1994 & Supp. II 1996); State Immunity Act, 1978, ch. 33, pt. I (UK), 17 ILM 1123 (1978). Case law is divided on the question whether state immunity also applies to individuals acting in an official capacity. *See* *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990); *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (mem.). The Law Lords in *Pinochet III* carefully limited the exclusion of immunity for former heads of state to criminal proceedings.

<sup>82</sup> For an overview, *see* RATNER & ABRAMS, *supra* note 36, at 193–204, with further references.

<sup>83</sup> *See, e.g.,* ICCPR, *supra* note 2, Art. 2(3); Torture Convention, *supra* note 70, Art. 7; American Convention on Human Rights, Nov. 22, 1969, Arts. 1, 2, 1144 UNTS 123; Velásquez-Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, 1988 ANN. REP. 35, para. 166; Report of the Human Rights Committee, 47 UN GAOR, Supp. No. 40, Annex VI, general comment 20(44) (Art. 7), para. 15, at 195, UN Doc. A/47/40 (1992). For extensive treatment, *see* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2551–612 (1991); Naomi Roht-Arriaza, *Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 57, 57–65 (Naomi Roht-Arriaza ed., 1995).

<sup>84</sup> *See, e.g.,* General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, Annex 7, Art. VI, 35 ILM 75, 138 (1996): "Any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law . . . or a common crime unrelated to the conflict, shall upon return enjoy an amnesty" (emphasis added).

not appear to draw a clear-cut line between the obligation to prosecute and punish violations of humanitarian law and the granting of amnesties for the purpose of reconciliation.

#### IV. RÉSUMÉ: POSITIVISM—AND BEYOND

The result of our endeavor remains double-edged: there does not seem to be "one correct answer" to the question of the applicability of international humanitarian law to internal armed conflict, only a patchwork of considerations to be applied to particular problems.<sup>85</sup> Under these circumstances, the ethical standpoint of the observer—and the lawyer—will almost necessarily inform the answers provided, for instance in the application of general principles of law. The use of traditionalist methodologies makes such individual value choices visible. Thus, the professional ethics of a lawyer requires the impartial mediation of attitudes, ideologies or conflicts. But in this process it is standards derived from legal sources deemed to be representative of the attitude of the community that provide the yardsticks for finding *a*—not *the*—correct solution to a legal problem.

So far, it seems, the traditional sources of international law have displayed enough flexibility to cope with new developments. Even if they may not satisfy the intellectual quest for unity of the international legal system, these sources have stood the test of time and have been universally accepted. As long as no alternative legal processes that would be universally acceptable are in sight, the old ones will simply have to do. And yet, the vision of an international law more amenable to the realization of global values remains compatible with the regime of traditional sources. However, this is true only to the extent these values find "sufficient expression in legal form."<sup>86</sup> Thus, the nonapplication to internal conflicts of the bulk of humanitarian law is gradually giving way to the establishment of universal criminal jurisdiction of both international and domestic tribunals in any kind of conflict. This development is being brought about by the traditional means of international lawmaking through state consent. Further, contemporary international law increasingly renders individuals accountable for violations of the most basic humanitarian rules. As lawyers with strong human rights sensibilities, we welcome this development with sympathy, even enthusiasm.

BRUNO SIMMA AND ANDREAS L. PAULUS\*

#### POLICY-ORIENTED JURISPRUDENCE AND HUMAN RIGHTS ABUSES IN INTERNAL CONFLICT: TOWARD A WORLD PUBLIC ORDER OF HUMAN DIGNITY

Real problems, like the problem posed, are not amenable to simple solutions. Human rights abuses in internal conflicts usually have roots deep in history and the collective psyche of the individuals and groups involved. To prevent them, the certain prospect of a swift punitive reaction on the international plane might have a useful deterrent effect. But if a violent conflict or genocide is in progress, the expectation of punishment may not by itself be likely to end the conflict. Ironically, it may prolong the plight of the

<sup>85</sup> See Ratner, *supra* note 1, at 250: "The portrait of international criminal law is one of a legal environment resembling more a patchwork than a coherent, let alone complete, system."

<sup>86</sup> South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, Judgment, 1966 ICJ REP. 6, 34, para. 49 (July 18).

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persecuted, since persecutors may conclude that they have no alternative but to fight to the bitter end to avoid the consequences of their misdeeds. To deal with major incidents of unauthorized coercion and violence, an amnesty for the violators might contribute to a lessening of the toll in blood of a particular ethnic or religious rage. But that, again, might be an incomplete reaction, since the victims of the atrocities committed will not find solace, satisfaction or rehabilitation. Nor will persons who may be pathologically violent be removed from circulation. Where society remains unreconciled, jarred, conflicted—in a state of continual animosity between warring families, clans or ethnic, religious or social groups—"cold" war might heat up and erupt at any time in the future even more violently than before. Thus, truth commissions have been established in various contexts at least to shine the light of searching inquiry on situations in which truth has always been the first casualty. Still, such agencies alone might not suffice to bring about social reconciliation and restoration. Neither might bodies set up to mete out justice in the form of civil compensation. International criminal courts may send a message to people elsewhere contemplating massive violations, but they may do nothing to reconstruct the civil society that has been disrupted.

The problem posed for this symposium engages a range of goals for the international community, including restoring minimum order where it has been breached, reducing the expectation of violence, reestablishing practices of a productive civil society, eliminating or mitigating the factors that could, in varying combination, reignite particular conflicts, and deterring the occurrence of comparable offending behavior in the society at issue and in others that are watching. Seen in this comprehensive, problem-oriented way, the subject matter discussed includes quite a variety of factual contexts and decision variables. Given the space constraints of this symposium, a thorough treatment of the range of circumstances involving human rights abuses in internal conflict is not feasible, even though our approach is well suited for such a study. In fact, our jurisprudence has yielded a variety of detailed case studies with specific recommendations. While we could have delved into an exacting analysis of one particular context of atrocities, we would have been forced to leave out other important and possibly differing factual and decision contexts. The Holocaust, for example, presents factors and variables at variance from those relevant to Pinochet's Chile, Rwanda, Cambodia or Kosovo.

Thus, to be true to the inclusive, nonreductionist goals of our theory of and about law, we will provide the reader with a set of intellectual tools that can be used analytically and prescriptively to deal with any circumstance involving abuses of human rights. We will highlight, and illustrate with examples, the topics and steps of inquiry suggested by our approach as relevant to the symposium and will leave detailed consideration of the multiplicity of factors in any given context to a more expansive forum.

#### POLICY-ORIENTED JURISPRUDENCE: INTRODUCTION AND ORIENTATION

Our approach, designated as policy-oriented jurisprudence,<sup>1</sup> provides guidance to scholar, adviser or decision maker for directing attention to the relevant features of

<sup>1</sup> The principal statement and delineation of policy-oriented jurisprudence is presented in Lasswell & McDougal's two-volume treatise, HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992). For earlier expressions of the approach, see HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1965, with a new introduction) (1935); and HAROLD D. LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* (1950). See also W. MICHAEL REISMAN & AARON M. SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* (1987); RONALD D. BRUNNER, *CAPITALIZING THE POLICY SCIENCES: FOR GLOBAL CHANGE RESEARCH* (forthcoming); and WINSTON P. NAGAN, *THE SCIENCE, LAW AND POLICIES OF HUMAN DIGNITY* (forthcoming). Alternatively, our approach has been designated as "law, science and policy," "configurative jurisprudence" and "New Haven School." We prefer the term "policy-oriented jurisprudence" because it focuses attention on the content of our theory about law.

particular contexts for purposes of inquiry and effective intervention. We are asked whether "individuals should be held criminally accountable for human rights abuses in internal conflicts." Seen from the perspective of our jurisprudence, the inquiry needs to be clarified in far greater detail. Posing the following kinds of questions helps to clarify the inquiry and illustrates the types of issues we consider essential to such clarification, the process of which bears importantly on the development of specific strategic recommendations to improve present circumstances that involve human rights abuses. What do we mean by "human rights abuses"? Are we to cover only affronts to human dignity that affect the physical integrity of persons? Or do we include attacks on their moral integrity, such as the exclusion of persons from major benefits of society on account of their race, ethnicity, sex or national origin? Are violations of so-called civil and political rights part of the picture? What about claims characterized as "social," "economic" or "cultural rights"? Do the abuses have to be widespread or systematic? Or do sporadic events, such as individual acts of torture, qualify? Must the abuses be conducted by government officials or persons acting under color of government approval? Does the term "internal conflict" include only clashes between two or more contending factions, or should it also encompass the infliction of major injury by one group on another that does not put up a serious fight? Is violence a necessary ingredient to the conflict? Should situations of brooding intragroup hostility form part of the inquiry?

The topic of this symposium was further clarified in a request from its editors that we cover the desirability *vel non* of holding individuals criminally or otherwise accountable for "atrocities committed during civil wars—murder, torture, rape, indiscriminate attacks, etc." Thus, the empirical scope and domain of human rights abuses under consideration was reduced to large-scale incidents of violence during civil war. We suggest that, for purposes of this overview, the terms "internal conflict" or "civil war," narrowly defined as they may be in existing international documents, should not limit the scope of inquiry *ab initio*. A discussion of the broader community's response to atrocities in internal conflict should not deny consideration to the factual context of, for example, the Holocaust, the genocidal rage waged against a defenseless group that did not rise up against the government or, by way of arms, in any significant way resist the Nazis' unilateral campaign of extermination. Nor do we think that similarly one-sided slaughters such as the ones committed in Kampuchea and Rwanda should be excluded simply because they involved no organized and sustained struggle, no armed defense, i.e., no "conflict" in the Geneva Conventions' strict sense. We posit that it is most useful to construe the topic under consideration in terms of the proper response by the world community to large-scale incidents of violence in internal contexts. Thus, this inquiry covers events reaching from the Holocaust to Pinochet's Chile, from the outrages in the former Yugoslavia to Pol Pot's killing fields. Unfortunately, these events are only mentioned *illustrandi causa*; they cover but the tip of an iceberg of inhumanity.

To address these and similar issues, policy-oriented jurisprudence gives specificity to the key terms in the question posed in the symposium. For example, for our approach "human rights" refers to those human desires or wants that the politically relevant members of a community decide to authoritatively protect and promote. On the basis of historical and anthropological research, Professors Lasswell and McDougal, the founders of policy-oriented jurisprudence, developed a classification to inventory human desires or wants, i.e., what people value; hence the term "values." All people value power, enlightenment, wealth, well-being, skill, affection, respect and rectitude. Although the approach defines each of these terms, it is important to emphasize that these eight value categories, as with all of the conceptual categories that are a part of policy-oriented jurisprudence, are logically exhaustive, but empirically open. For example, the specification of each value, the relative importance of particular values, and how values are and

should be shaped and shared will vary from context to context, depending on the configuration and interstimulation of many factors, including the culture, class, interests and personalities of those involved. The ways that the world community addresses these issues and the outcomes of its deliberations largely make up the international human rights program. Large-scale incidents of violence, in particular, constitute major violations of values such as well-being, respect, affection and rectitude.

For policy-oriented jurisprudence, "law" is the process through which members of a community seek to clarify and secure their common interest. Human rights are established, maintained and changed through the action of this process and refer to the way law in any community authoritatively protects and empowers individual human beings in their ongoing efforts to shape and share each of the eight values. When the community in question is the world community, the process through which such protection and empowerment are established, maintained and changed is the empirical phenomenon referred to by the term "international law of human rights."

Among the distinctive aspects of policy-oriented jurisprudence, a few might benefit from elaboration in this context. First, law is conceived of as an ongoing process of authoritative and controlling decision.<sup>2</sup> It is a human artifact, established, maintained and changed by the decisions of the politically relevant actors.<sup>3</sup> In particular, law is not equated with a "body of rules" that enforce themselves. Rules always require for their implementation the "conveyor belt of human action,"<sup>4</sup> which is powered in large measure by human decision within particular communities. It is critical to understand that decision and law are not synonyms. For policy-oriented jurisprudence, only those decisions, i.e., communications with *policy*, or prescriptive, *content*, that are taken from communitywide perspectives of *authority* and backed up by *control intent*, are characterized as law. These are decisions that are made by the persons who are expected to make them, in accordance with criteria expected by community members, in established structures of authority, with sufficient bases in effective power to secure consequential control, and by authorized procedures. Compliance with the policy content of authoritative decision promises and/or generates significant benefits or indulgences in terms of any or all values; noncompliance is sanctioned by the threat and/or imposition of severe deprivations, again, in terms of any or all values.<sup>5</sup>

<sup>2</sup> For further discussion, see LASSWELL & McDOUGAL, *supra* note 1. With respect to international law, see Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 189 (1968), reprinted in MYRES S. McDOUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS* 43 (1981); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 ASIL PROC. 101 (1981); W. Michael Reisman, *The View from the New Haven School of International Law*, 86 ASIL PROC. 118 (1992); Siegfried Wiessner, *International Law in the 21st Century: Decisionmaking in Institutionalized and Non-Institutionalized Settings*, 23 THESAURUS ACROASIAM 113 (1997).

<sup>3</sup> The German school of interests jurisprudence of the 19th century similarly focuses on the process of law as a continuing struggle. See Rudolf von Jhering's powerful introduction to his lecture *Der Kampf um's Recht*:

The life of the law is struggle, a struggle of nations, state power, classes, interest groups, and individuals. All law is the result of strife; every important rule had to be wrested from those who opposed it, and it remains alive only as long as those who support it stand ready to defend it. Law is not an abstract idea, but a living force.

RUDOLF VON JHERING, *DER KAMPF UM'S RECHT* 1 (Vienna, Manz 1872) (our trans.). See also RUDOLF VON JHERING, *DER ZWECK IM RECHT* (Leipzig, Breitkopf und Haertel 1877).

<sup>4</sup> Wiessner, *supra* note 2, at 129.

<sup>5</sup> Policy-oriented jurisprudence also provides a refined way of thinking about processes of decision making. It conceives of decision processes in terms of the functions they perform. These functions include the gathering of intelligence, the promotion of preferences, the prescribing of authoritative policy or lawmaking, the invocation of prescriptions, the application of prescriptions, their termination, and the appraisal of the aggregate performance of a community's decision processes in terms of community goals. For further discussion, see Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive*

The jurisprudence of positivism provides the counterimage to this empirical, dynamic conception of law. Its common focus on "existing" rules, emanating solely from entities deemed equally "sovereign," does not properly reflect the reality of how law is made, applied and changed. Positivism remains fixated on the past, trying to reap from words laid down, irrespective of the context in which they were written, the solution to a problem that arises today or tomorrow in very different circumstances. Without identifying the conditioning factors of the past decisions they rely on—such as the personality, political inclinations, gender and cultural background of the decision makers, as well as the mood of the times, and other societal factors—positivists try hard, in an ultimately futile quest for "certainty" of law, to predict future decisions. But, as they do not take into account changing and changed contexts (e.g., different legislators, judges, shifts in public opinion), their predictions are unlikely to be precise; they may even be inaccurate. Moreover, positivists gain no help from their theory when asked what the law "should" be. Indeed, their theory eschews any creative or prescriptive function. Conversely, Bruno Simma and Andreas Paulus's charge against the "New Haven School" as "conflating law, political science and politics"<sup>6</sup> is not backed up by reference to any of its proponents' works; more important, it is unfounded. As detailed above, law is not to be equated with processes of power. It is a process of authoritative and controlling decision, a very concrete part of the social process at large.<sup>7</sup>

Another dimension of policy-oriented jurisprudence that bears on the problem posed in the symposium concerns the approach's comprehension of human rights in terms of the eight values mentioned above. By conceptualizing human rights in this way, the jurisprudence provides much-needed specificity for what is potentially at stake in the context of possible human rights abuse. The approach considers a hu-

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*Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 403 (1967), reprinted in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 73 (Richard A. Falk & Cyril E. Black eds., 1969), and in MCDUGAL & REISMAN, *supra* note 2, at 191.

<sup>6</sup> Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AJIL 302, 305 (1999).

Other approaches featured in this symposium go outside the narrow confines of text and do, at least partially, engage the social context in which legal decisions are made. To that extent, law and economics as presented by Dunoff and Trachtman offers valuable analytical tools. See Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AJIL 394 (1999). Regarding the goal of efficiency, they can elucidate the appraisal of different policy options. What we remain to be convinced of is the capacity of law and economics to provide a meaningful response to all the values humans desire, especially when they reach beyond the realm of wealth.

With respect to Mary Ellen O'Connell's *New International Legal Process*, 93 AJIL 334 (1999), the author's acknowledgment of law as a dynamic enterprise, and her recognition of the element of authority in decision are most helpful. The problem with this exposition is that law is more than a narrative technique of statements of authority of the past; it has a present and future dimension (which she sees), and it involves making choices. The issue is: where does the author receive guidance for making such choices? It does not help to invoke a collection of theories that are often incompatible with each other (e.g., feminism and liberalism; liberalism and republicanism; law and economics and feminism). All these theories are quite distinct in their normative value content, and do not necessarily result in common policy preferences, even at a high level of abstraction. "[C]onfidence in institutional settlement" may be a "central NLP value," *id.* at 339, but it does not provide any guidance as to the substantive policy preferences that should inform the institution's decision.

Kenneth W. Abbott's survey of the approaches to the study of international relations, as laid out in *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AJIL 361 (1999), is illuminating, but the approaches he describes, like other contributions to this symposium, provide little guidance as to what the law should be with respect to human rights abuses in internal conflict. While Abbott describes international relations approaches as "separat[ing] analysis from normative or policy goals," *see id.*, note 6, none of them in fact address such goals in any detail. The absence of these goals may indicate the exact opposite: the goals may be insinuated in the analysis, either consciously or unconsciously. Conversely, as explained in this essay and elsewhere, analysis and goal clarification are two of the five distinct intellectual tasks that policy-oriented jurisprudence undertakes.



man rights abuse to be any event or series of events in which individuals are deprived of any of the eight values (or any combination or mix of the values) if the deprivation results from the infringement or violation of an authoritatively protected practice associated with the shaping and sharing of the value(s) in question; these authoritatively protected practices may or may not be codified in a printed document.<sup>8</sup> Also, determining whether or not a value deprivation occurred or may occur is not always a straightforward matter.

Just as the determination of the incidence of value deprivation is context-dependent, so, also, is the characterization of a value deprivation as constituting a human rights abuse—thus permitting or demanding an authoritative response. This is the case because the configuration of perspectives of authority that bear on particular value deprivations varies from context to context. Living in a state of fear, with a prevalent expectation of impending violence, is certainly a condition of value deprivation. But whether or not it constitutes a human rights abuse depends on shared patterns of authority among the politically relevant actors. Note also that an observer may conclude that a context of major value deprivation is not the result of human rights abuses, but that, in the observer's judgment, it should be viewed as such. For policy-oriented jurisprudence, this kind of intellectual and emotional situation is not uncommon. It may be upsetting, but it is rarely disorienting.

The dispersal of relevant perspectives of authority also makes determining the locus of a particular conflict context-dependent. Simply because a value deprivation or human rights abuse "occurs" in New York or New Delhi or Santiago does not necessarily mean that it is an internal matter, resulting from "internal conflict." Geography and space are only two dimensions of the total manifold of events that define a particular situation or conflict. To students of humanitarian law, for example, this aspect is obvious, as the laws of war and their application—and the demand for their application—have changed a great deal over the last century. But it is not only humanitarian law that is changing; all law, including those practices that authoritatively protect and empower individuals in their pursuit of all values, is always under stress and subject to change in all contexts. Accordingly, policy-oriented jurisprudence provides methods for tracking the development of law, criteria for appraising its contribution to clarifying and securing the common interest, and procedures for improving its performance in any community.

#### HUMAN RIGHTS ABUSES IN INTERNAL CONFLICT: A BRIEF OVERVIEW

With these considerations in mind, an appraisal of individual criminal accountability as an appropriate response to abuses of human rights must be situated in the context of each circumstance as it relates to the sanctioning goals of the world community. Moreover, these sanctioning goals need to be specified with more clarity so as to place the option of criminal accountability in the context of a broad range of other potential community reactions to breaches of fundamental community policies. These goals range from the prevention of particular human rights abuses, to their suspension, to deterrence of future such acts, and to a broader-based, sustained restoration of society. For example, if a serious violation of minimum public order is about to occur, the first goal should be to prevent its outbreak. If atrocities are already under way, the most urgent goal is to arrest the disturbance, to bring the ongoing violation to an immediate end.

<sup>8</sup> For further discussion of the way policy-oriented jurisprudence treats words—whether or not crystallized in print—and deeds as indicators of law, see *INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS* (W. Michael Reisman & Andrew R. Willard eds., 1988).

Thereafter, broader objectives are to deter the recurrence of such events, to restore public order, to correct the behavior generating violations, to rehabilitate victims and offenders, and to reconstruct society in such a way as to avoid future such manifest dysfunctions.<sup>9</sup>

The determination of whether or not and to what extent holding individuals criminally accountable for human rights abuses contributes to the achievement of these public order goals is sensitive to the context of each circumstance. To formulate an appropriate response, decision makers and their advisers are thus urged to identify the root causes and perpetuating factors of the conflict under scrutiny—its history; the actors involved and other participants; their claims, perspectives and bases of power; the location of the conflict; the place where decisions are made; and so forth.

Policy-oriented jurisprudence systematically addresses the contextual concerns just mentioned. This objective is accomplished by carrying out various commonsense intellectual operations or tasks.<sup>10</sup> The first task is the *clarification of the observer's standpoint*. To be aware of possible distortions of perception and judgment, scholars, advisers and decision makers must try to make themselves conscious of their particular standpoint vis-à-vis the problem confronting them. In clarifying our individual standpoint, we stand a chance of becoming aware of otherwise hidden parochialisms, biases or neurotic tendencies that would possibly skew a rational look at the problem. That does not imply our holding a brief for the complete subjectivization and consequential impossibility of rational analysis and decision making. We are, however, acutely aware of the need for introspection and critical review of our own policies and value preferences as essential activities in the tasks of analysis and formulation of recommendations in the global common interest.

One's perception of "the law" can differ substantially depending on whether one is a member of the system observed, whether one is an outsider, or whether one lives at its margin. It may also vary depending on one's culture, class, education, gender, age, life experiences, and other factors. One's view of "the law" may also change depending on the role one performs—e.g., a scholar, an employee of a nation-state or international organization, an advocate, a judge, an official of a nongovernmental organization, an accused or a victim. More often than not, one acts differently in different roles. Every role and corollary perspective, however, is authentic and has its place and function in the process of authoritative and controlling decision. Also, decision making in institutionalized and noninstitutionalized settings is markedly different.<sup>11</sup> The different roles and attendant conceptions of law that Martti Koskenniemi describes in his lives as a scholar and a Finnish government official<sup>12</sup> thus do not come as a surprise; they are to be expected by a realistic jurisprudence. The gender perspective chosen by Hilary Charlesworth<sup>13</sup> is properly identified as relevant and important. Of course, perspectives vary and scholars and decision makers committed to human dignity must be sensitive to variations in perception that attend each perspective and role and must select practices that are appropriate to the task at hand.

<sup>9</sup> Policy-oriented jurisprudence has laid out these objectives in greater detail in MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 261–383 (1994); RICHARD ARENS & HAROLD D. LASSWELL, *IN DEFENSE OF PUBLIC ORDER: THE EMERGING FIELD OF SECTION LAW* (1961); W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175 (1995).

<sup>10</sup> For elaboration, see LASSWELL & MCDUGAL, *supra* note 1, pt. III, at 725–1128.

<sup>11</sup> See Wiessner, *supra* note 2, at 146–47, 153.

<sup>12</sup> Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AJIL 351 (1999).

<sup>13</sup> Hilary Charlesworth, *Feminist Methods in International Law*, 93 AJIL 379 (1999).

## PRINCIPLES OF CONTENT

Owing to the critical importance of context—whether for scholarly appraisal or strategic intervention—policy-oriented jurisprudence developed a systematic, analytical method for revealing the finer structure of any problem situation. By addressing the following questions, scholars, advisers and decision makers can gain a thorough contextual understanding of specific problem situations, including those associated with human rights abuses, as well as greater insight into their own standpoint and orientation regarding the problem of concern.

The approach asks, who is involved or who is a *participant* in the context under scrutiny? With respect to the problem posed, the domain of potential participants, including victims, perpetrators and all who respond in varying ways to instances of human rights abuses or alleged abuses, is worldwide. For analytic, appraisive or strategic purposes, policy-oriented jurisprudence offers a comprehensive inventory of possible modes of participation in social or decision processes.<sup>14</sup> Besides the traditional nation-state, whether independent or associated with another actor, the world social and decision processes include intergovernmental organizations, non-self-governing territories, autonomous regions, and indigenous and other peoples, as well as private entities such as multinational corporations, media, nongovernmental organizations, private armies, gangs and individuals. An actor with actual or potential influence is a candidate for participation in the decision process; and by grasping the totality of the international process of decision, policy-oriented jurisprudence enables scholars, advisers and decision makers to be maximally effective while empowering nonstate entities to play greater roles in decision. The individuals involved and modalities of participation vary from context to context. Human rights activists and nongovernmental organizations, for example, have been critical to the development of prescriptions, including the formation of the international criminal court.

The *perspectives* of participants are explored in terms of their identifications, their expectations—including their expectations of authority—and their demands for values. With respect to human rights abuses in internal conflicts and responses to them, many factors shape perspectives, including the culture, class, interests, personality and crisis experience of the participants. Of course, the role of the participants is important as well. Victims and perpetrators of human rights abuses are not expected to have similar perspectives, although their subjectivity may have more in common than one might anticipate.

*Situations* of interaction are examined in terms of their spatial, temporal, institutional and crisis dimensions. It is important to know where abuses take place; whether they occur in a small geographic setting or over a large area; whether they are systematic or intermittent and sporadic, or both; whether the underlying hostility has developed over generations or an atrocity was committed “in the heat of the moment”; whether the abuses take place in war or other circumstances involving a high expectation of violence or whether they happen in times of peace and tranquility; and whether they are committed with a strong or a weak public order system in place—i.e., whether there are mechanisms of accountability such as effective structures of authority and control for possibly deterring offensive conduct or restoring public order, be they clear standards of criminal and/or civil liability, domestic and/or international tribunals, truth and reconciliation commissions, international intervention forces, or other such means.

<sup>14</sup> For further discussion and demonstration of the modalities of participation, see LASSWELL & MCDUGAL, *supra* note 1, pt. II, at 335–590.

The assets or *base values* that participants draw on in their efforts to achieve their demanded values are inventoried in terms of authority to perform certain functions and control over access to and use of values. Some participants may rely on power and rectitude; others, on enlightenment, respect and wealth; and still others, on their skill, affection and well-being. An understanding of the combination of values participants use in contexts of ongoing or potential human rights abuse should inform the response to the abuse, alleged abuse or potential abuse. For example, if perpetrators of human rights abuses depend on power, wealth, skill and affection, an appropriate response focuses, in part, on changing how the perpetrators access and use these values. The authority of participants to carry out different tasks or functions is also identified. Thus, in some contexts, certain participants are authorized to invoke human rights prescriptions and others are not. Some participants are authorized to craft new human rights prescriptions, others to apply existing and new prescriptions, and still others to appraise existing prescriptions. Moreover, the authority of institutional arrangements designed to address relevant instances of human rights abuse will change from context to context. In one setting, authority for amnesties may be widespread and relatively solid. In others, it may be virtually nonexistent. Because the authority of such arrangements is context-dependent, it is never known, with specificity, in advance of a particular problem. The authority and potential authority of each arrangement, in addition to its access and potential access to values, must always be determined empirically in a given context.

The *strategies* available to participants are considered in terms of a persuasive-coercive continuum and their reliance on the diplomatic, ideological, economic and military instruments. In most instances, combinations or assemblages of these instruments are mobilized and deployed. For example, the ongoing process of establishing an international criminal court has involved in varying degrees the use of each of the four instruments.

The *outcomes* of interaction are tracked on a continuing basis and in terms of the five previously identified phases or features of a context. For example, those who use policy-oriented jurisprudence want to know how participation in the context under scrutiny has been affected by the events that transpired. We also want to explore how participation is likely to be affected in projected future contexts of a similar character. Changes in perspectives, situations, base values and strategies are examined in like fashion. But outcomes and projected futures are not simply identified and elaborated. They are tested for their congruence with the goals and preferred policies for public order. For example, if the institutional arrangements established and applied to deal with a series of internal human rights abuses lead to deprivation for many people, policy-oriented jurisprudence encourages intervention, if possible, to try to mitigate and ameliorate the situation, even if the original community response to the human rights abuses was lawful. This is the case because law, in our view, is only a means to an end, not an end in itself. Fundamentally, policy-oriented jurisprudence is concerned with the goals of founding and maintaining *minimum public order*, in the sense of striving to eliminate the use of unauthorized coercion and violence; and in advancing toward an *optimum public order*, in terms of establishing and sustaining decision processes through which an ever-accumulating and wider enjoyment of all values is realized.<sup>15</sup> The goal of maximizing access to all values by all differs from the traditional Benthamian calculus by expanding the focus beyond the 'greatest happiness of the greatest number,' which may leave minorities out in the cold.

<sup>15</sup> On minimum and optimum public order, as well as the interrelationship, approaching identity, of peace and "human rights," see Myres S. McDougal & Siegfried Wiessner, *Law and Minimum World Public Order*, in McDougal & Feliciano, *supra* note 9, at xxviii [hereinafter McDougal & Wiessner, *Minimum Order*]; Myres S. McDougal & Siegfried Wiessner, *Law and Peace in a Changing World*, 22 CUMB. L. REV. 681, 683 (1992).

It neglects no one in the intended benefit.<sup>16</sup> As should be clear, our approach recommends that scholars, and not only advisers and decision makers, concern themselves both with identifying what the law is in specific contexts and with appraising the quality of that law so as to be able to offer suggestions for its improvement.<sup>17</sup>

By providing what might be called "mapping" procedures or the means to develop a detailed picture or map of specific contexts, policy-oriented jurisprudence enables observer, adviser or decision maker to make a refined appraisal of the events under scrutiny.<sup>18</sup> The approach makes it possible to identify particular features and combinations of features that are problematic in specific contexts now and in projected future contexts. In one context, an appraisal might conclude that the human rights problem is that access to particular arenas is too restricted; in another, it may be that the kind of institutional arrangement that would best respond to certain human rights abuses has not yet been established, even though the authority for its founding exists. Alternatively, an appraisal may indicate that a human rights abuse results primarily from the failure to invoke and apply existing human rights prescriptions. An appropriate response to this type of situation is not to call for more law, but to examine the entire social and decisional process to uncover those features of the process that blunt or prevent effective invocation and application. In still other contexts, those who are applying the international community's response to instances of human rights abuse in internal conflicts may themselves become perpetrators of shocking behavior. Hence the need for safeguards and procedures to monitor, appraise and adjust, if necessary, the conduct of those who have been authorized to deal with abuses or alleged abuses of human rights.

#### PRINCIPLES OF PROCEDURE

In addition to what policy-oriented jurisprudence designates as *principles of content*, which refer to what scholars, advisers and decision makers are to focus their attention on, it provides *principles of procedure*, which refer to how the content is to be treated. Five intellectual or problem-solving tasks are recommended. The order in which they are carried out is not fixed. Moreover, the results of working on each task can be expected to influence how the others are performed and the outcomes they produce. The five tasks are the clarification of goals, the description of conflicting claims and past trends in decision, the analysis of factors that shape the trends in decision, the projection of future trends, and the invention, evaluation and selection of alternatives.

#### *Clarification of Goals*

The detailed *clarification and specification of goals* is sensitive to particular contexts. The overriding commitment of policy-oriented jurisprudence to a public order of human

<sup>16</sup> Obviously, this understanding of optimum order is not necessarily reflected in the actual policies and practices of any particular government, including that of the United States. In addition, the values, as identified above, include human aspirations for respect and affection, just as much as desires for power, wealth and rectitude—to name but a few. If modern international law is, indeed, reflective of a "man's world," as Charlesworth intimates, see Charlesworth, *supra* note 13, text following note 7, this should be identified as a problem, analyzed, and rectified.

<sup>17</sup> Comprehensive demonstrations of how policy-oriented jurisprudence applies this recommendation can be found in MYRES S. McDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* (1980); and McDougal, Lasswell & Reisman, *supra* note 5.

<sup>18</sup> Policy-oriented jurisprudence offers detailed maps of the world community, of world politics and of international law. See, respectively, Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988); Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Process of Effective Power: The Global War System*, in MYRES S. McDUGAL & W. MICHAEL REISMAN, *POWER AND POLICY IN QUEST OF LAW* 353 (1985); and McDougal & Reisman, *supra* note 5.

dignity, in which access by all to all the values humans desire is maximized, and to pursuing the sanctioning goals enumerated above, is not. This means that the commitment to preventing discrete public order violations, suspending violations that are occurring, deterring potential public order violations, restoring public order after it has been violated, correcting the behavior that generates violations, rehabilitating victims, and reconstructing the social process to remove conditions that appear likely to generate future public order violations is unyielding. Furthermore, our approach always considers progress toward achieving these goals in terms of the ways that different strategies are likely to influence the shaping and sharing of values. However, because the specification and relative priority of each value are likely to vary from context to context, the task of general clarification and specification must take account of prevailing international and local conditions and, in particular, the perspectives of participants.

### *Identification of Conflicting Claims*

*Conflicting claims* are important social parameters of any problem. They must be identified, together with the universe of claimants, their perspectives and their bases of power. They are context specific. With respect to the problem at hand, the main battle lines are drawn between those who favor retaining exclusive control by the nation-state over the sanctioning of individual acts characterized as "criminal" offenses and committed on its territory, and those who view the international community as authorized, or even mandated, to characterize certain egregious violations of human dignity as "international crimes" to be prosecuted potentially in any criminal court on the planet, and to apprehend, unilaterally if need be, alleged perpetrators. The former, oftentimes government officials and ruling elites fearful of being accused of exactly such international offenses, not only base their claim on the time-honored mantra of state "sovereignty," the "right to self-government." They also have the major arsenal of instruments of coercion at their disposal—primarily military might designed to deter and defend against any foreign intervention. Another reason advanced against extranational adjudication and settlement of serious violations of internal public order is the goal of protecting the integrity of the workings of indigenous community institutions: domestic organs of government, especially if representative of the people, it is said, know best how to define optimum public order, how to restore it, and how to rehabilitate civil society. This goal might include, it is argued, the granting of amnesty for serious human rights violators if that is the only way to bring an end to bloody conflict and/or pervasive oppression. Conversely, extranational decision makers, especially judicial fora, might be largely ignorant of important local factors, and, because of limitations on the gathering of evidence, might be virtually unable to ascertain crucial relevant information. Foreign courts might also be less protective of the civil liberties of defendants than their home state in its criminal proceedings.

The counterposition, articulated first by victims, then adopted by nongovernmental organizations committed to the defense of human rights, and now increasingly espoused by governmental elites, relies on the perceived need to pierce the "sovereign veil" of a country's criminal jurisdiction if atrocities of the above-mentioned kind are left unpunished, for whatever reason. It took the horrors of the Holocaust to jog decision makers into clearly defining the prescriptive parameters of the international crime against humanity and prosecuting offenders before an inter-, i.e., extranational forum. Other conduct that shocked world opinion, such as mass rape and executions in Bosnia and the killing rages of Kampuchea and Rwanda, prompted claims for expanding the definition of international crimes, and for extraterritorial, possibly international adjudication. In response to the criticism of selective enforcement and insufficient procedural protec-

tions, the cry for a permanent international criminal court grew ever louder. Also, ever more torts claims for damages based on alleged violations of the "customary international law of human rights" were raised—in the context of torture in Paraguay, slave labor in Nazi Germany, and even conditions of detention of illegal immigrants in the United States. To stop widespread abuses, such as in the Haiti of Raoul Cedras, most respectable human rights organizations openly advocated the use of force by "humanitarian intervention"—a device previously reviled as a smoke screen for "imperialist action."

### *Past Trends in Decision and Conditioning Factors*

How has the world community responded, with authority and control intent, to these conflicting claims? We need to assess *past trends in decision*, i.e., determine how well the sanctioning process of the world community has performed in reaching its goals of preventing and restoring public order with respect to specific internal conflagrations. We should investigate not only how the international system performed, but also why it succeeded or failed. This involves a close analysis of predispositional and environmental *conditioning factors*. Space permitting, our approach would test each of the various prescriptive devices, institutional arrangements and mechanisms of accountability identified below as responses to breaches and impending or potential breaches of public order, for their contribution to achieving the goals for sanctioning and moving public order more in a direction compatible with human dignity. We would also want to examine trends with respect to holding individuals accountable—whether "criminally" or otherwise—for human rights abuses. Again, the task involves both tracking trends and appraising them against the goals established for a preferred public order.<sup>19</sup>

Identification and analysis of those factors and combinations of factors that have shaped trends in decision are especially important when ascribing responsibility for successes and failures and in bringing clarity and precision to efforts at strategic intervention. This task confronts the question of why trends have been what they are. Policy-oriented jurisprudence conceptualizes the universe of potential *conditioning factors* most broadly in terms of predispositional and environmental factors. In differing contexts, how have these factors influenced the operation of the institutional arrangements for dealing with ruptures and potential ruptures of public order, including, once again, those that pertain to abuses of human rights? When this question is addressed in specific contexts, it becomes plausible to craft and put into effect alternative strategic interventions that are more likely to succeed because they are tailored to the context of conditions of concern. Factors and factor combinations that have helped in the achievement of goals can be strengthened and those that have frustrated achievement can be mitigated, neutralized or removed. The following discussion only briefly illustrates how policy-oriented jurisprudence can be used to identify and appraise major trends in decision with respect to the public order goals stated above.

<sup>19</sup> Arens and Lasswell's conclusion about the impact of the usage of the terms "civil" and "criminal" on sanctioning policy in the United States is provocative. They wrote:

It is impossible to read the text of statutes or opinions and keep much confidence in the clarifying function of the terms "civil" or "criminal." The conclusion is inescapable that the terms spread intellectual confusion throughout the courts, the administrative system, the legislatures, and the community at large.

... Unmistakably the two labels "criminal" and "civil" are blinding the minds of all concerned to the consideration of the severity of the deprivations at stake and barring the path to a proper clarification of sanction policy. Fossilized terms of art, long since divorced from the frame of whatever theoretical structure they once expressed, are distorting modern society in its approach to sanction law.

ARENS & LASSWELL, *supra* note 9, at 64–65.

The international system has been painfully ineffective at *avoiding* situations of major human rights violations. The examples include not only the Holocaust itself, but also the recent massacres in Rwanda, Bosnia and Kosovo. The reason for this failure could relate, in part, to successful concealment of the violation from international attention, as in the case of the Holocaust; lack of interest and dearth of media focus, as in Rwanda; or lack of international resolve, as in all of the above. Conditioning factors that contribute to this trend include the absence of world attention and negligible geostrategic interests of powers otherwise likely to intervene. The thirty-six-year conflict in Guatemala is a case in point.

As far as *arresting* ongoing atrocities is concerned, we do have a mixed record. While it is ever more accepted that the use of force under the guise of humanitarian intervention<sup>20</sup> is a lawful response to situations of genocide or similar violations of fundamental human rights, at least if authorized by the Security Council, the instances of such organized community action have been few and far between. First examples of such protective responses can be seen in the Security Council's decisions limiting the Iraqi Government's sovereign rule over certain parts of the country in order to protect Kurdish and Shiite minorities, and the United Nations-inspired action to stop anarchy in war-torn Somalia. The Security Council's authorization of the intervention in Haiti<sup>21</sup> appears to be the clearest example of such human rights-inspired international license to use force to date. If the Bosnian conflict is conceived, at least in part, as internal, such internationally authorized intervention occurred there as well. In the case of Kosovo, an international organization, NATO, intervened militarily, diplomatically and ideologically in an attempt to stop large-scale human rights violations inflicted on an ethnic minority. Individual states' actions to arrest ongoing atrocities have been more frequent, in particular when they affect citizens of the intervening country. Complex geopolitical considerations often attend the global community's response to unilateral action, as witnessed in the reaction to Vietnam's invasion of then-Kampuchea under Pol Pot.

To *deter* human rights abusers and to *correct* their behavior, international prescriptions have clarified community policies regarding the scope of individual protections and have increasingly amplified the range of actions for which individuals are held criminally or civilly accountable. The International Military Tribunals of Nuremberg and Tokyo established the principle of international criminal responsibility for crimes against peace, crimes against humanity and war crimes. The reference in the Nuremberg Tribunal Charter's definition of "crimes against humanity" to acts "before or during the war"<sup>22</sup> should be seen in the historical context of the limited jurisdiction of this court and does not lessen the prescriptive value of its delimitation of the offense to acts outside the context of international armed conflict.<sup>23</sup> On the ashes of the Holocaust, the 1948 Genocide Convention established international criminal liability of government officials and private persons alike for the act of genocide, defined in Article II as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." It also obligated states parties to enact domestic legislation to criminalize this

<sup>20</sup> See McDougal & Wiessner, *Minimum Order*, *supra* note 15, at xxxvii (with further references); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973); FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988); and SEAN D. MURPHY, HUMANITARIAN INTERVENTION 266-75 (1996). See also Robert M. Chilstrom, *Humanitarian Intervention under Contemporary International Law: A Policy-Oriented Approach*, 1 YALE STUD. WORLD PUB. ORD. 93 (1974).

<sup>21</sup> Authorization to member States to form a multinational force, under unified command and control, for Haiti, SC Res. 940, UN SCOR, 49th Sess., Res. & Dec., at 51, UN Doc. S/INF/50 (1994).

<sup>22</sup> Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Art. 6(c), 59 Stat. 1544, 82 UNTS 279.

<sup>23</sup> In fact, the wording "before . . . the war" expresses the intent to criminalize action taken outside the context of international armed conflict as well.



offense and to provide effective penalties. Trials should be held before the courts of the state in which the crime was committed or before an international criminal court. Common Article 3 of the 1949 Geneva Conventions and 1977 Additional Protocol II formulated new offenses against the "law of nations" in internal conflicts. Since individual criminal responsibility on an international level was not referred to expressly in these provisions, their application in discrete instances of violation was first left to domestic decision-making bodies, such as military tribunals and courts of general jurisdiction. The Statute of the International Criminal Tribunal for the former Yugoslavia prescribed individual criminal liability for violations of the "laws or customs of war."<sup>24</sup> The Statute of the International Criminal Tribunal for Rwanda broke new ground in that it established the jurisdiction of an international criminal court over individuals accused of having committed genocide, crimes against humanity, exhaustively defined, and violations of common Article 3 of the 1949 Geneva Conventions and Additional Protocol II in the internal context of the Hutu's large-scale atrocities against the ethnic group of Tutsi in Rwanda in the summer of 1994.<sup>25</sup> These prescriptions by the Security Council buttressed the argument that customary law, rapidly formed, now mandates that at least "grave breaches" of the Geneva Conventions not only trigger individual criminal responsibility, but that they are proscribed in internal conflicts as well.<sup>26</sup>

Criticism has been leveled at the world community's differential treatment of atrocities, depending on whether they are committed in peacetime, during international armed conflict, or within the context of an internal conflagration.<sup>27</sup> The 1998 Rome statute establishing an international criminal court addresses some of these concerns, as it incorporates war crimes as well as genocide, crimes against humanity and the crime against peace in the subsidiary jurisdiction of this envisioned permanent tribunal.<sup>28</sup> While the narrow concept of genocide is maintained,<sup>29</sup> crimes against humanity are defined broadly as certain enumerated "acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."<sup>30</sup> Those enumerated acts now include, *inter alia*, murder, imprisonment, torture, rape and enforced disappearance of persons, as well as "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."<sup>31</sup> While two states had ratified this treaty as of April 11, 1999, eighty states had signed it.<sup>32</sup> How these statutes and international agreements are applied now and in future contexts will determine in important measure their contribution to achieving deterrence and correction.

<sup>24</sup> Statute of the International Tribunal for the former Yugoslavia, UN Doc. S/25704, annex, Art. 3 (1993), *reprinted in* 32 ILM 1159, 1192 (1993). For detailed analysis, see *Prosecutor v. Tadić*, Appeal on Jurisdiction, No. IT-91-1-AR72, para. 94 (Oct. 2, 1995), *reprinted in* 35 ILM 32 (1996).

<sup>25</sup> Statute of the International Tribunal for Rwanda, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1602 (1994).

<sup>26</sup> See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554 (1995).

<sup>27</sup> See Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237 (1998).

<sup>28</sup> Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9\*, *reprinted in* 37 ILM 999 (1998).

<sup>29</sup> *Id.*, Art. 6, in essence repeating the formulation of the 1948 Genocide Convention, Art. II. But see the broader formulation in *Prosecutor v. Akayesu*, Judgement, No. ICTR-96-4-T, §6.3.1 (Sept. 2, 1998): "In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of *any stable and permanent group*" (emphasis added). See also 93 AJIL 195, 196 (1999).

<sup>30</sup> Rome Statute of the International Criminal Court, *supra* note 28, Art. 7(1).

<sup>31</sup> *Id.*

<sup>32</sup> See Rome Statute of the International Criminal Court, ratification status as of 11 April 1999 (visited Apr. 13, 1999) <<http://www.un.org/law/icc/statute/status.htm>>.

In a contrary trend, states unrelated to the offense by traditional links such as "territoriality" or "nationality" have been remarkably reluctant to use the principle of "universal jurisdiction" to bring perpetrators of serious human rights abuses to justice. For a long time, there was the lone *Eichmann* precedent.<sup>33</sup> On October 16, 1998, however, former General Augusto Pinochet was arrested in London on the basis of an international arrest warrant issued by a Spanish magistrate judge. This warrant, broadened on October 19, 1998, accuses Pinochet of genocide and multiple acts of torture, hostage taking and terrorism during his rule over Chile from 1973 to 1990. The *Pinochet* extradition case is remarkable, at this point, both for the arrest itself and for the statement by the House of Lords, based on British domestic as well as international law, that former heads of state are no longer protected by foreign sovereign immunity if they commit acts of torture and hostage taking.<sup>34</sup> Spain's request for extradition is based on the jurisdictional principle of passive personality—ninety-four Spanish citizens were listed as victims—and on the universal jurisdictional ground of genocide. At the time of writing, several other countries had joined the effort to have Pinochet extradited to face trial for similar offenses, or were preparing to do so.<sup>35</sup>

Short of criminally prosecuting human rights offenders, countries at times are inclined to let punishment stand at removal from public office or employment of leading and/or rank-and-file supporters of prior abusive regimes. Many such "lustrations" took place as part of the transitions in Eastern Europe.

Another important goal, the *rehabilitation of victims*, has been furthered by the establishment of national and international compensation commissions, as well as the use of general torts regimes. For example, the Alien Tort Statute of 1789 has been used successfully in the United States to address issues of serious human rights abuse.<sup>36</sup>

*Restoration of public order*, traditionally not a matter of international concern, has been undertaken recently in situations such as the one in Haiti, where the old internal security forces were lustrated and a new police force trained and installed. The efforts to bring some measure of central authority and order back to Somalia are another, albeit largely unsuccessful, example of such international concern.

Finally, the *restoration of civil society* is a long-term process. Following the example of Argentina, at least twenty-five countries have used a combination of amnesties and truth

<sup>33</sup> *Attorney-General v. Eichmann*, 1965 Psakim Mehoziim 3, 36 ILR 5 (D.C. Jm. 1961), *aff'd*, 16 Piskei Din 203, 36 ILR 277 (S. Ct. Isr. 1962).

<sup>34</sup> *Regina v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1998] 3 W.L.R. 1456 (H.L.), 37 ILM 1302 (1998). In a remarkable opinion, set aside because of the perceived bias of another judge, Lord Nicholls of Birkenhead stated:

[I]t hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.

<sup>35</sup> ILM at 1333. The opinion of the Lords of Appeal of March 24, 1999, allowed for the extradition of Pinochet for acts of torture committed after December 8, 1988, based on the Torture Convention. *Regina v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1999] 2 W.L.R. 827 (H.L.).

<sup>36</sup> These countries include France, Luxembourg, Sweden, Belgium, Switzerland, Italy and Germany. See *Main events since Pinochet's arrest in October* (visited Nov. 25, 1998) <<http://www.cnn.com/WORLD/Europe/9811/25/BC-PINOCHET-CHRONOLOGY.reut/>>.

<sup>37</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *cert. denied*, 518 U.S. 1005 (1996); and *Jama v. INS*, 1998 WL 684473 (D.N.J. Oct. 1, 1998). But see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (1984).

and reconciliation commissions to smooth the transition to a public order of human dignity. The results are mixed and cannot yet be fully appreciated.<sup>37</sup> In Chile, for example, a serious effort was undertaken by an eight-member commission composed of four members from each of the opposing political sides, pro and contra the former military regime. The commission wrote a 907-page report documenting many instances of murder, disappearances, and torture. In most cases, however, it had to refrain from naming the persons responsible for the actions, in part because they were still serving in the armed forces and were protected by their leader, General Pinochet. Though an amnesty prevented most of the perpetrators from being brought to justice, the commission had no power to subpoena witnesses,<sup>38</sup> and the time frame of its work was extremely limited, the commission did a remarkable job of finding the truth.<sup>39</sup> Yet many families of the "disappeared" still do not know where the remains of their loved ones are located, and individual responsibility for murder and abuse has not often been allocated.

Another prominent example of such a commission, "cleaning up" after decades of apartheid and thus effectuating political as well as profound social change, is the Truth and Reconciliation Commission of South Africa. It had stronger powers than the Chilean institution, as exemplified by the subpoena and contempt citation of former Prime Minister P. W. Botha, and it granted "amnesties" judiciously and rarely—only 150 out of 7,000 applications, and only in exchange for the truth. It charted a careful, though not uncontested, course between the Scylla of impunity and the Charybdis of social chaos and disorder.<sup>40</sup> Whether or not truth commissions achieve their goal of social reconciliation appears to hinge, at least in part, on their structure and membership, their power

<sup>37</sup> For an insightful discussion, see HARVARD LAW SCHOOL HUMAN RIGHTS PROGRAM, *TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT* (1997).

<sup>38</sup> 1 CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, REPORT 14 (Eng. ed. 1993) [hereinafter CHILEAN REPORT]. See also PAMELA CONSTABLE & ARTURO VALENZUELA, *A NATION OF ENEMIES: CHILE UNDER PINOCHET* (1991); PATRICIA POLITZER, *FEAR IN CHILE: LIVES UNDER PINOCHET* (1989); MARY HELEN SPOONER, *SOLDIERS IN A NARROW LAND: THE PINOCHET REGIME IN CHILE* (1994); JACOBO TIMERMAN, *CHILE: DEATH IN THE SOUTH* (1987). Compare AUGUSTO PINOCHET UGARTE, *CHILE ON ITS WAY TO THE FUTURE* (1976).

<sup>39</sup> In describing the work of the commission, its member José Zalaquett Daher analyzed the moving forces:

The truth was considered as an absolute, unrenounceable value for many reasons: In order to provide for measures of reparation and prevention, it must be clearly known what it is that ought to be repaired and prevented. Further, society cannot simply black out a chapter of its history, however differently the facts may be interpreted. The void would be filled with lies or with conflicting versions. The unity of a nation depends on a shared identity, which, in turn, depends largely on a shared memory. The truth also brings a measure of social catharsis and helps to prevent the past from reoccurring. In addition, bringing the facts to light is, to some extent, a form of punishment, albeit mild, in that it provokes social censure against the perpetrators or the institutions or groups they belonged to. But although the truth cannot really in itself dispense justice, it does put an end to many a continued injustice—it does not bring the dead back to life, but it brings them out from silence; for the families of the "disappeared," the truth about their fate would mean at last, the end to an anguishing, endless search. It was deemed further that a thorough disclosure of truth was feasible, although probably the whereabouts of the remains of most disappeared will remain unknown.

José Zalaquett, *Introduction to the English Edition*, 1 CHILEAN REPORT, *supra* note 38, at xxiii, xxxi.

<sup>40</sup> 1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, REPORT 1, 50 (Susan de Villiers ed., 1998). The commission's chairman, Archbishop Desmond Tutu, stated the dilemma and its resolution the following way:

Those who have cared about the future of our country have been worried that the amnesty provision might, amongst other things, encourage impunity because it seemed to sacrifice justice. We believe this view to be incorrect. The amnesty applicant has to admit responsibility for the act for which amnesty is being sought, thus dealing with the matter of impunity. Furthermore, apart from the most exceptional circumstances, the application is dealt with in a public hearing. The applicant must therefore make his admissions in the full glare of publicity. Often this is the first time that an applicant's family and community learn that an apparently decent man was, for instance, a callous torturer or a member of a ruthless death squad that assassinated many opponents of the previous regime. There is, therefore, a price to be paid. Public disclosure results in public shaming, and sometimes a marriage may be a sad casualty as well.

to compel the production of evidence, and their backing from all parts of the societal spectrum. Blanket amnesties seem to generate a lesser sense of urgency in the perpetrators to come forward than a system of individual pardons for only those abusers who "come clean" and testify truthfully and completely about their excesses.

In long-term perspective, the raising and maintaining of individual and collective knowledge about large-scale atrocities in a country's past is a key ingredient in this process of restoring civil society. Thus, education about the Holocaust has been an important element in the development of a responsible civic consciousness in postwar Germany.

Important *conditioning factors*<sup>41</sup> for the increased realization of individual accountability for human rights abuses include the virtual omnipresence of information on these events, generated by satellite and other sophisticated communication technology. Vivid images of the mass slaughters in Rwanda and the blood spilled in Sarajevo's Sniper Alley fill the living rooms around the world and cannot fail to leave an impact. Also, human rights activists move tirelessly to create new international prescriptions, essentially forcing issues such as the prohibition of land mines and the establishment of an international criminal court on often-reluctant state elites. Pinochet's arrest and world reaction suggest, from today's vantage point after the fall of communism, that leaders as well as rank and file have ever more difficulty understanding why the campaigns of the 1970s and 1980s against political opponents in this hemisphere were waged with such ferociousness and righteousness. Institutions of the world community such as the Security Council have been largely freed of the ideological blinders of the Cold War and have been able to provide fora and standards to bring some of the worst offenders to justice.

### *Projection of Future Trends*

*Projecting future trends* requires an understanding of conditioning factors and how they might express themselves in the future. As with its assessment of past trends, policy-oriented jurisprudence is interested not only in what the future might bring, as opposed to what the past has brought, but also in how well the future is likely to approximate a public order of human dignity. To address this issue, our approach uses the projection of what are called "developmental constructs," which are both pathways and pictures of possible futures and can be quite specific to particular contexts. For example, a construct could be developed of a setting in which human rights abuses take place relatively infrequently at present, but in which they become increasingly common and virulent over time. Different institutional arrangements or mechanisms of accountability would be included in the construct or projection to show how each could operate, more or less successfully. The purpose of this construct and of developmental constructs, in general, is to provide guidance to scholars, advisers and decision makers through the provision of empirically grounded anticipations of the future. Such guidance is designed to help navigate contemporary societal rapids and enhance the likelihood of decisions that move public order toward human dignity and away from the eventuation of dystopias. In our

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We have been concerned, too, that many consider only one aspect of justice. Certainly, amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature. We believe, however, that there is another kind of justice—a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships—with healing, harmony and reconciliation. Such justice focuses on the experience of victims; hence the importance of reparation.

Demond Tutu, *Foreword by Chairperson*, *id.* at 1, 8–9.

<sup>41</sup> For a useful discussion of what he calls "explanatory variables," see CARLOS SANTIAGO NINO, *RADICAL EVIL* (Oxford 118–34 (1996)).

context, optimistic projections would envisage the prescription and effective application of international criminal standards against tough and powerful offenders. Conversely, a pessimistic construct would include a situation in which prescription becomes idle talk, as most of the egregious offenders are not sanctioned effectively and both the general public and the ruling elites grow cynical about the enforcement of human rights.

*Alternatives and Recommendations in the Global Common Interest*

The *invention, evaluation and selection of alternatives* is, in some measure, the culminating task in the procedure for solving problems. This can be an especially creative endeavor and builds on the results of the other tasks. Strategic intervention, whether in response to or in anticipation of human rights abuses in internal conflicts, is more likely to be accepted and successful when goals have been clarified, trends described, the conditions accounting for the trends identified and analyzed, and alternative futures projected. It is extremely context-sensitive.

With respect to any instance of large-scale human rights atrocities, a variety of community responses are available, judging from the experience of the past and the imagination of the future. These responses may involve authoritative action by local and/or international or foreign decision makers. Pertinent arrangements include, but are not limited to:

- prescription of human rights law, humanitarian law, the law of state responsibility, and the law relating to civil and criminal individual responsibility for international crimes;
- prosecution before national courts of so-called universal crimes based on established theories of "jurisdiction," such as passive personality and the concept of "universal jurisdiction";
- prosecution before international criminal tribunals, ad hoc or permanent;
- judicial assistance and extradition to foreign or international criminal courts;
- denial of sovereign or diplomatic immunity for international crimes;
- national lustration mechanisms;
- national civil remedies;
- international compensation mechanisms;
- gathering of facts through commissions of inquiry and truth commissions, both national and international;
- national and international reconciliation commissions;
- refusal to allow violators the beneficial consequences of actions deemed unlawful; and
- individual pardons and general amnesties.<sup>42</sup>

Each of these arrangements, alone or in combination, and others that have yet to be considered, can be established, maintained, changed or terminated. As indicated above, a clear understanding of the fundamental goals of the international community as it responds to the various instances of human rights abuses in internal conflicts, as well as a thorough contextual analysis of the individual conflict under consideration, is needed to craft a response tailored to the circumstances of the problem at hand.

<sup>42</sup> For details and applications, see W. Michael Reisman, *supra* note 9; STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 266-303 (1997), reviewed by Jordan J. Paust, 33 TEX. INT'L L.J. 631 (1998); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1997); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, in ASSOCIATION INTERNATIONALE DE DROIT PÉNAL, REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS 45, 57-64 (Proceedings of the Siracusa Conference 17-21 September 1998, Christopher C. Joyner, special ed., 1998).

## CONCLUSION

Policy-oriented jurisprudence does not promise or guarantee one correct, single answer to the question(s) posed in this symposium. It does offer a comprehensive, detailed and self-aware approach to any problem, including the issue at hand. One of its distinctive features is its highly integrated capital stock of concepts and propositions about human behavior that can be used to focus one's attention on any problem for purposes of inquiry and action. This foundation is critical because the approach's basic framework for inquiry does not need to be invented anew whenever one is confronted by a novel problem context. Policy-oriented jurisprudence provides a stable frame of reference, including a series of heuristics for "mapping" any social, legal or decision context and an all-inclusive set of intellectual tasks that can be used by scholars, advisers or decision makers for purposes of self-orientation and strategic intervention in the flow of pertinent events. The approach is comprehensive and supple so that once one understands how to use it, one can apply it to an infinite variety of problems. Maximizing intelligence on any given issue, it enhances the making of better, more informed choices. With respect to all problems, from the heartrending to the mundane, the overriding goal of policy-oriented jurisprudence is to arrive at solutions that reflect the global common interest in approximating a world public order of human dignity.

SIEGFRIED WIESSNER AND ANDREW R. WILLARD\*

## NEW INTERNATIONAL LEGAL PROCESS

## INTRODUCTION

International legal process (ILP) emphasizes understanding how international law works. It concentrates not so much on the exposition of rules and their content as on how international legal rules are actually used by the makers of foreign policy. It is a more limited methodology than some others discussed in the symposium in that it did not, as originally developed, expose the normative values of the methodology, or how the methodology could be used to achieve those values. Nevertheless, ILP, as a study of international law in its actual operation and the consideration of how international law could work better, has had a significant influence on American international law scholarship.

In recent years scholars have responded to ILP's "normative deficit," and a "new ILP" is emerging. New ILP retains ILP's focus on understanding how international law works, but also suggests that the method should have certain normative values, values different from or in addition to those of positivism and inspired by the insights of other contemporary methodologies. New ILP also advocates that, in the achievement of society's normative values, international institutions be given the authority to make decisions in support of those values, even if the rules of positivism do not fully support the same result.

This essay looks in part I at the origins of ILP and the developments toward new ILP. Part II applies original and new ILP to the symposium questions, and part III compares ILP with the other methods presented in these pages.

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## I. ORIGINS AND PREMISES OF INTERNATIONAL LEGAL PROCESS

ILP began its existence with the Chayes, Ehrlich and Lowenfeld adaptation of American legal process to international legal studies in their 1968 casebook, *International Legal Process*.<sup>1</sup> The book acknowledges the authors' debt to Professors Hart and Sacks of Harvard University,<sup>2</sup> considered among the chief architects of the American legal process method (LP).<sup>3</sup> LP became in the 1950s—and remains—a principal legal methodology in the United States. During the past two decades scholars have worked to reform legal process. The recent work of Harold Koh has indicated that this resulting "new legal process"<sup>4</sup> has applications to international law.<sup>5</sup> Professor Koh encourages the view that a far more complete legal methodology for international law could be built from the tenets of legal process, both new and old. This section examines American legal process, the teachings of LP that have been applied to date to international law, and recent developments in American legal process that could be applied to ILP to create "new international legal process."<sup>6</sup>

*American Legal Process*

Hart, Sacks and the many other legal process scholars of their generation developed a method for answering the questions: What is law for? How does law operate? What is the relationship between law and society?<sup>7</sup> It was not a theory of law such as positivism, Marxism, or natural law but, rather, a method for understanding, using and improving upon positivism. Positivism provided the theory of obligation, but these scholars wanted to modify the legal method they had learned as students, legal formalism, for applying positivism. They also wished to improve upon a method that had already developed to respond to legal formalism, namely Legal Realism.

With the rise of administrative agencies and the increased activity of courts and lawyers in the 1920s and 1930s in the United States, scholars sought to develop a more authentic account than existed in legal formalism of the role of institutions, formal and informal, in the legal system.<sup>8</sup> Concentrating on courts, legal realists rejected the formalistic view that judges could mechanically apply legislation or common-law precedents. Judges must interpret laws and sometimes even make them; they do not simply apply them. LP parted company with Legal Realism, however, because, "once the realists demonstrated that inarticulate considerations of social policy inform judges' decisions, it naturally followed [for the realists] that legal decision-makers should explicitly consider social and economic consequences when developing or applying a rule."<sup>9</sup> This did not naturally follow for LP. According to

<sup>1</sup> ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, *INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE* (1968).

<sup>2</sup> *Id.* at xxi.

<sup>3</sup> See William N. Eskridge, Jr., & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in HENRY M. HART, JR., & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* at li (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994).

<sup>4</sup> See HART & SACKS, *supra* note 3; William N. Eskridge, Jr., & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991); Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919 (1989).

<sup>5</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997) [hereinafter Koh, *Nations*]; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) [hereinafter Koh, *Transnational*]; Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2400 (1991) [hereinafter Koh, *Public Law*].

<sup>6</sup> Koh, *Public Law*, *supra* note 5, at 2394.

<sup>7</sup> HART & SACKS, *supra* note 3, at liv.

<sup>8</sup> *Id.* at lix-lxii.

<sup>9</sup> *Id.* at lviii.

Hart, "A court in making law is bound to base its action not on free judgment of relative social advantage, but on a process of reasoned development of authoritative starting points (i.e., statutes, prior judicial decisions, etc. etc.)."<sup>10</sup>

LP agreed with the realists that courts must from time to time make law, but LP sought to constrain that lawmaking. It should not be done with the view of realizing a judge's personal view of policy but, rather, that of the larger society. LP insisted "that law is accountable to reason and not just fiat."<sup>11</sup> In addition, LP wished to provide a truer picture of what law actually was—legislation and judicial decisions, yes, but also agency decisions and the private agreements negotiated by lawyers. In urging understanding of law's institutions, Hart and Sacks also urged "consideration of legal doctrine in light of law's purposes and the polity's underlying principles."<sup>12</sup> Law's purpose is to settle "by authority of the group various types of questions of concern to the group."<sup>13</sup> The acceptable answers to such questions should be guided by society's values, which Hart and Sacks theorized in the United States to be democratic values. Ensuring reasoned decisions consistent with law's purpose and society's values could be done by establishing who the legally competent decision makers are and requiring those decision makers to provide "reasoned elaboration" of their decisions.<sup>14</sup>

### *International Legal Process*

International law also had its realists, but ILP developed not in response to them, but to realists from the discipline of international relations. By the beginning of the Cold War, international relations realists were arguing that international law played virtually no role in international affairs, especially in the area of the use of force.<sup>15</sup> Chayes, Ehrlich and Lowenfeld, in the tradition of Hart and Sacks to whom their casebook is dedicated, embarked on the path of helping students to understand not American society and its law, but international society and international law, examining the role the law and lawyers actually play in international society. Chayes and his co-authors could not agree with the realists that law and lawyers played no role because they had themselves been part of the process of international law during the Kennedy administration.

While they found that "the whole field of international law is undergoing fundamental theoretical reexamination," their book, "by contrast, is addressed primarily to the study of the international legal process itself. How—and how far—do law, lawyers, and legal institutions operate to affect the course of international affairs?"<sup>16</sup> They were not as interested in the content of rules as with four interrelated questions, very much derived from the Hart and Sacks perspective:<sup>17</sup>

First, the allocation of decision-making competence in international affairs . . . .

Second, the reasons why a particular regulatory arrangement is adopted for a

<sup>10</sup> *Id.* at lxxix-lxxx (quoting Hart's Legislation Notes (1946-47), Oct. 29, 1946, at 8-9).

<sup>11</sup> *Id.* at civ.

<sup>12</sup> *Id.*

<sup>13</sup> HART & SACKS, *supra* note 3, at lxxxiii (quoting Henry Melvin Hart, Jr., Notes and Other Materials for the Study of Legislation (1950)).

<sup>14</sup> *Id.* at xci.

<sup>15</sup> See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 202, 213 (1993).

<sup>16</sup> CHAYES, EHRLICH & LOWENFELD, *supra* note 1, at xi.

<sup>17</sup> Hart and Sacks had called on their students to consider three corollaries: first,

no social question can be intelligently studied without a sensitive regard to the distinctive character of the institutional system within which the particular question arises. . . .

The second corollary is . . . attention to the constant improvement of all of the procedures. . . .



particular subject-matter area, rather than another mode of control or none at all. Third, the ways in which particular institutions and the system as a whole develop to restrain and organize national and individual behavior. And finally, the elements of the political, economic and cultural setting that predispose to success or failure in that development.<sup>18</sup>

They concluded that, while law was not usually decisive, it was usually important to international affairs, and "like Hart and Sacks, [they] posited that legal issues mainly arise not before courts, but in the process of making policy decisions, with lawyers playing a more important role than judges, and consent playing a greater role than command."<sup>19</sup> Chayes and Ehrlich followed up the casebook with examinations of the role of law in decisions on the use of force. Chayes looked at the Cuban missile crisis and Ehrlich examined the situation in Cyprus.<sup>20</sup> Both concluded that law "constrained," "justified" and "organized" decision makers' actions, even if it did not dictate them.

These scholars were not, however, trying to develop a "school."<sup>21</sup> They were interested in how law worked in international society and also in relating to students the actual role of international law and international lawyers in international relations. They did not go as far as Hart and Sacks in identifying the values of the legal system, focusing rather on describing the workings of international legal processes—especially the formal and informal institutional processes such as the way foreign offices incorporated international law in decision making. They also advocated consideration of how the processes of international law could be improved. Chayes turned to work on the compliance-attracting power of international treaty regimes.<sup>22</sup> Ehrlich considered the body of rules governing the use of force and the role of institutions in applying and enforcing them in *International Law and the Use of Force*.<sup>23</sup> Lowenfeld concentrated on the functioning of international trade institutions and international arbitration for the settlement of disputes.<sup>24</sup> And along with them, a great number of American international lawyers concentrated on describing the actual workings of international law, explaining why the law works the way it does, and promoting ways to improve it.<sup>25</sup>

### *New International Legal Process*

At about the time Chayes, Ehrlich and Lowenfeld were applying LP to international society, American legal process fell on hard times within the United States. Democratic

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The third corollary is . . . [k]nowledge of the . . . various procedures of official and private settlement, and the principal doctrines and practices which govern their operation and determine their effect.

HART & SACKS, *supra* note 3, at 5–6.

<sup>18</sup> CHAYES, EHRLICH & LOWENFELD, *supra* note 1, at xii.

<sup>19</sup> Koh, *Transnational*, *supra* note 5, at 189.

<sup>20</sup> ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* (International Crises and the Role of Law, 1974); THOMAS EHRLICH, *CYPRUS 1958–1967* (International Crises and the Role of Law, 1974). Both books were part of a series sponsored by the American Society of International Law. Other titles in the series included ROBERT R. BOWIE, *SUEZ 1956* (International Crises and the Role of Law, 1974); and GEORGES ABI-SAAD, *THE UNITED NATIONS OPERATION IN THE CONGO 1960–1964* (International Crises and the Role of Law, 1978).

<sup>21</sup> Discussion with Professor Abram Chayes, Baltimore, Md. (Oct. 9, 1998). *But see* Koh, *Nations*, *supra* note 5, at 2618.

<sup>22</sup> ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

<sup>23</sup> THOMAS EHRLICH & MARY ELLEN O'CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* (1993).

<sup>24</sup> *See* ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* (1993); Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AJIL 477 (1994).

<sup>25</sup> Koh, *Nations*, *supra* note 5, at 2620, states that "few international legal scholars openly affiliated themselves with the international legal process school." But later he writes, "Yet in the United States, the study of legal process continued to dominate the study of international law." *Id.* at 2625–26.

values were criticized as leaving out underrepresented minorities. The reliance of dispute settlement on precedent and deference to elected legislatures meant that courts and agencies were not correcting democracy's "pathologies." Legal process became the target of the critical legal studies movement, feminism, critical race theory, and others.<sup>26</sup>

In the 1980s, however, scholars in the United States began to work on LP's normative deficit. New American legal process (NLP) or "new public law," which appears to be a different name for a related group of concepts, has a number of identifiable characteristics that update and enrich Hart and Sacks's legal process. Eskridge and Frickey have added to Hart and Sacks's democratic values, with insights from feminism, republicanism, hermeneutics, and so on. In addition to expanding LP's normative element, Eskridge and several co-authors describe NLP as continuing old legal process's faith in institutions and the need for institutional decision makers to be purposive in decision making. They now want this purposiveness to expand, however, to "dynamic" decision making.<sup>27</sup> In looking at judicial interpretation of statutes, for example, more elements should be borne in mind than merely the statute's purpose, including the need to respond to change over time, to respond to legislative and agency pathologies, and to value new substantive norms beyond liberal democratic principles.<sup>28</sup> "The mood is contritist, taking traditional formal authorities seriously but purposively. The agenda is to balance form and substance, to view the legal system as a purposive whole, and to explore both functionally and formally institutional competence and the role of process."<sup>29</sup>

Professor Koh, writing about this movement, finds that these scholars "saw the law's legitimacy as resting not just on process but also on its normative content. They viewed law-making as not merely the rubber-stamping of a pluralistic political process, but as a process of value-creation in which courts, agencies, and the people engage in a process of democratic dialogue."<sup>30</sup> Inspired by the work of new legal process, Koh has called on scholars to add the insights of the NLP and other new legal movements to international legal theory.<sup>31</sup> He points to the importance of thinking beyond the functioning of a process to the normativity of that process. Koh's own work has both described the "dynamic," "non-traditional," and "non-statist" processes of international law and mentioned the normativity of these processes.<sup>32</sup>

By pointing to normativity in international law, Koh's work indicates the normative deficit of earlier ILP. ILP did not develop an answer to the questions What is law for? and What is the relationship between law and society? So the values of the system were not revealed, nor were the procedures that decision makers should follow in reaching them. Koh does not himself elaborate on these questions beyond indicating their importance to a methodology.

Following the direction of his lead would suggest looking to feminism, liberalism, law and economics, republicanism, and other new international legal theories to supplement the values of positivism in developing the normative goals of the system. Human rights, peace and protection of the environment, for example, would be values for international society as understood by these contemporary perspectives on society.<sup>33</sup> In addition to

<sup>26</sup> See HART & SACKS, *supra* note 3, at cxiii-cxxv.

<sup>27</sup> On dynamic decision making, see, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1496-97 (1987).

<sup>28</sup> Eskridge & Peller, *supra* note 4, at 707; Rodriguez, *supra* note 4, at 919.

<sup>29</sup> HART & SACKS, *supra* note 3, at cxxvi.

<sup>30</sup> Koh, *Transnational*, *supra* note 5, at 188.

<sup>31</sup> Koh, *Public Law*, *supra* note 5, at 2400.

<sup>32</sup> Koh, *Transnational*, *supra* note 5, at 181.

<sup>33</sup> See, e.g., JAMES N. ROSENAU, *ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLORING GOVERNANCE IN A TURBULENT WORLD* 182 (1997).

these new values, it seems appropriate for ILP to add the values of legal process that were not originally incorporated into ILP, but that remain even after the reform of LP. In particular, confidence in institutional settlement continues as a central NLP value.

The resulting new ILP, therefore, would advocate knowledge of the legal system and valuing institutional settlement in line with international society's values, to resolve society's rapidly expanding issues. Institutions for settlement should follow dynamic procedures, meaning that as society's values evolve, duly established decision makers should "have the authority to develop new legal standards and even to adapt otherwise clear . . . text to accommodate a changed societal and legal environment"<sup>34</sup> through reasoned elaboration of their decisions.

## II. THE APPLICATION OF INTERNATIONAL LEGAL PROCESS

### *Classic ILP*

In its original or classic form, ILP is limited as a method for answering the symposium questions. Without a normative element, ILP has little to say in response to a "should" question like the one posed for the symposium: To what extent *should* individuals be held criminally accountable for human rights abuses in internal conflicts, both in terms of the substantive law and the mechanisms for accountability? ILP could instead answer this question: To what extent *are* individuals being held accountable for human rights abuses in internal conflicts, both in terms of the substantive law and the mechanisms for accountability? Taking its cue from the four questions taken from the Chayes, Ehrlich and Lowenfeld text above, ILP might further inquire into why individuals are or are not being held accountable; why policy makers have chosen the particular rules and mechanisms they have for accountability; how these rules and mechanisms are meant to restrain behavior; and whether these rules and mechanisms are successful. Thus, the ILP methodologist would describe what is actually occurring and seek to explain actual events.

Looking just at the 1990s, one finds numerous conflicts that were predominantly civil wars and in which atrocities were committed, including but not limited to those in Afghanistan, Algeria, Azerbaijan, Bosnia, Burundi, Cambodia, Congo, Guatemala, Indonesia, Liberia, Nicaragua, Russia, Rwanda, Sierra Leone, South Africa, Sri Lanka, Tajikistan, Turkey and Yugoslavia. To what extent have individuals been held accountable for the atrocities committed in these conflicts? Unfortunately, no comprehensive study has analyzed this question, nor could one be undertaken in preparation for this essay. Nevertheless, it seems safe to conclude that few individuals have been held accountable, especially in terms of international law.

Why has this been the case? Adam Roberts, who has studied the role of law in armed conflict (including internal conflict), thinks much of the problem can be traced to the fact that these were civil wars, in whole or in part:

The application of the laws of war to civil wars raises both a legal and practical problem. The legal problem is that governments usually have been reluctant to create or sign on to a body of law which would bind their freedom of action in dealing with armed rebellion. Thus, the treaty-based rules formally applicable in such conflicts have been inadequate . . . . The practical problem is that civil wars are notoriously bitter. . . . Each side is likely to deny the legitimacy of the other; training in the laws of war may be limited; the neat distinction between soldier and civilian frequently breaks down; and the scope for a compromise settlement of the

<sup>34</sup> Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 715 (1998).

war is usually slight. Trying to secure even a minimal level of observance of rules is peculiarly difficult in such circumstances.<sup>35</sup>

Thus, the development of rules and mechanisms of accountability remains peculiarly difficult for civil wars. Yet, as Professor Roberts notes, strides have been taken especially with the establishment of two international criminal tribunals in further developing both the substantive rules and mechanisms of accountability. And ILP would point to additional developments since he wrote, explaining why they occurred. These new mechanisms are resulting in holding a larger number of individuals accountable. Whether they will succeed in reducing the number of atrocities remains to be seen. Roberts has expressed some reason for doubt. The paragraphs below describe a number of mechanisms, what law they apply, why policy makers formed them, how they are meant to restrain prohibited behavior, and reasons for success or failure. The examples chosen are of formal mechanisms since information about them is more readily accessible than for informal mechanisms. ILP methodologists would surely also be interested in informal mechanisms of accountability in international law, such as diplomatic protest.

Most of the examples of individuals being held accountable for human rights abuse during internal armed conflict, certainly before the 1990s, have involved national courts. Generally, international law was not applied but, rather, national criminal law. This mechanism demonstrates the view of governments mentioned by Roberts in the quote above. Governments have traditionally viewed rebellions as internal affairs, not subject to international rules or procedures. Until recently, international courts did not even exist for holding individuals from such conflicts accountable. Nor did other alternatives to national courts, such as truth commissions. Even with these new developments, most societies hold that trial and punishment of those committing crimes is appropriate and deters crime through both imposing consequences and demonstrating society's values. Thus, national trials are likely to remain the means of choice.

Professor Roberts's assertion that governments are reluctant to allow international law to play a role in their internal conflicts extends to national trials and is illustrated by the case of Abdullah Ocalan in Turkey. Ocalan, the leader of the Kurdish Workers' Party (PKK), was arrested in Kenya in February 1999 and returned to Turkey to face charges of treason in a Turkish court.<sup>36</sup> Applying international law or turning Ocalan over to an international or nonparty tribunal would presumably add an air of legitimacy to the PKK as a group fighting for independence. Nor has Turkey been inclined to indict members of its own military for human rights abuses or violations of humanitarian law in its fight against the Kurds, in part perhaps for similar reasons—referencing international law might appear to give the Kurds a status in the international community that Turkey does not want them to have. Turkey has made these choices despite the fact that there may be incentives to act otherwise. For example, eliminating human rights abuse in the campaign against the Kurds and holding trials of offenders could enhance Turkey's standing among those nations considering its application for membership in the European Union. Ocalan's case demonstrates the obstacles to accountability encountered through exclusive reliance on national courts in cases involving their own citizens, one of the elements that predisposes this mechanism to failure under the fourth question posed by Chayes et al.<sup>37</sup>

While such recourse has not worked in the case of Turkey, states may be induced to hold their own nationals accountable by the concern that the state itself could be held

<sup>35</sup> Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 13 (1995).

<sup>36</sup> Amberin Zaman, *Turkey's Alienated Kurds; Government Raids, U.S. Policies Cited as Reasons for Backing Rebels*, WASH. POST, Feb. 16, 1999, at A11.

<sup>37</sup> CHAYES, EHRLICH & LOWENFELD, *supra* note 1, at xii.

responsible for not taking measures. Bosnia has brought a case against Yugoslavia for violation of the Genocide Convention.<sup>38</sup> The Convention contemplates national trials for perpetrators of the covered crimes, and failure to hold such trials could result in a state-to-state claim before the International Court of Justice. Similarly, calls from the United Nations Security Council or other organizations may induce states to hold individuals responsible. In Resolution 764, the Council called on all parties to the Yugoslav conflict to comply with their obligations under international humanitarian law and to hold persons who commit or order the commission of grave breaches individually responsible.<sup>39</sup> The London conference on the former Yugoslavia also called for "all possible legal action to bring to account those responsible for committing or ordering grave breaches of international humanitarian law."<sup>40</sup>

These pressures have not been terribly successful in inducing trials or other means of accountability by the warring parties to the Yugoslav conflicts. They probably did add, however, to the impetus behind the trials held by courts of states not involved in the Yugoslav conflict. Several European national courts have taken jurisdiction over individuals in their territory, holding them accountable under international law, including human rights and humanitarian law protections, in significant numbers for the first time since the Second World War. These cases have applied to all parties to the Yugoslav conflicts. Germany has taken more than three dozen cases involving individuals on its territory.<sup>41</sup>

In *Director of Public Prosecutions v. T (D.P.P. v. T.)*, the defendant (identified in the press as Refic Saric<sup>42</sup>) was a Croatian national living in Denmark under a temporary visa for persons from the territory of the former Yugoslavia.<sup>43</sup> He was tried and sentenced to a Danish prison "for assault of a particularly cruel, brutal or dangerous nature and of such a malicious character and with such grave consequences as to constitute particularly aggravating circumstances . . . in early August 1993 in the Croatian POW camp of Dretelj in Bosnia."<sup>44</sup> Not only did Saric's crimes occur in Bosnia, but also no Danish citizens appeared to be among the victims. Nevertheless, since Saric was in Denmark, Danish courts took jurisdiction under a law implementing the Geneva Conventions and tried him under municipal criminal law, which implements certain provisions of the Conventions.

The four Geneva Conventions and Additional Protocol I thereto, however, provide for individual responsibility and accountability through universal jurisdiction only in the case of the "grave breaches" as found in the main Geneva Conventions.<sup>45</sup> Moreover, common Article 2 of the Conventions provides that this "grave breaches" regime applies only to international armed conflict.<sup>46</sup> The Danish jury, and the Supreme Court on appeal, found that Saric had committed "grave breaches" of the Conventions: "[T]he

<sup>38</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), Order, 1993 ICJ REP. 3 (Apr. 8).

<sup>39</sup> SC Res. 764 (July 13, 1992).

<sup>40</sup> Roberts, *supra* note 35, at 56-57.

<sup>41</sup> See William Drozdiak, *Bosnian Serb Gets Life in Massacre of Muslims*, INT'L HERALD TRIB., Sept. 27-28, 1997, at 2.

<sup>42</sup> *Bosnischer Muslim beteuert seine Unschuld*, SÜDDEUTSCHE ZEITUNG, Aug. 12/13, 1995, at 6.

<sup>43</sup> *Id.*

<sup>44</sup> *Director of Public Prosecutions v. T* (E. High Ct., 3d Div. Den., Nov. 22, 1994) (Danish Ministry of Foreign Affairs, Legal Service, unofficial trans.) (on file with author) [hereinafter D.P.P. v. T.].

<sup>45</sup> See, e.g., Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 146, 6 UST 3516, 75 UNTS 287.

<sup>46</sup> *Id.*, Article 2 provides:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

requirements set out in the Conventions as to 'grave breaches' have been met in the case of all counts of the indictment."<sup>47</sup> The Court sentenced Saric to eight years' imprisonment in a Danish prison.<sup>48</sup> The decision does not discuss whether the conflict in Bosnia was internal or international. The implication is that the Court found that issue irrelevant.

The United States has opened its courts to victims of human rights abuse in internal conflict to allow them to hold perpetrators accountable, even in cases where the individuals involved are not U.S. citizens. Through the Alien Tort Statute, United States federal courts have jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>49</sup> Victims of the Bosnian civil war have brought a case under the Act against Radovan Karadžić.<sup>50</sup> Karadžić, however, remains at liberty in the Republika Srpska. Anne-Marie Slaughter, a student of Chayes, has described the Alien Tort Statute and why this mechanism exists in United States law: "[T]he Alien Tort Statute was a straightforward response to what the Framers understood to be their duty under the law of nations."<sup>51</sup> It is very likely out of a sense of duty as well that the European national courts have been trying war criminals from Yugoslavia. There is no doubt also a sense that human rights may be better respected in future conflicts if individuals are held accountable, and the trials have probably succeeded to some extent in reinforcing the principle that human rights apply even during armed conflict. On the other hand, as the *Karadzic* case shows, the court needs to have custody of the accused, and that has not been so in many cases. Further, this mechanism has so far been restricted to Europe and North America.

Besides courts, states have tried truth commissions as a way of holding their own accountable. These allow the victors as well as the vanquished to be part of the process without the seemingly insurmountable obstacle that any of the victors could potentially end up in jail. But having both sides of the civil conflict involved makes the process seem fairer. According to Jose Alvarez, another student of Chayes, truth commissions "are usually designed not to inflict legal punishment but as 'a kind of non-adversarial process of re-establishing democratic justice by exposing the truth'"<sup>52</sup> and thereby fostering national reconciliation. Law will set the parameters of the inquiry, and that may be international law. The recent finding of the Historical Clarification Commission of Guatemala revealed serious human rights abuse, even amounting to genocide. Ninety-seven percent of the crimes were found to have been committed against the Mayan Indians by the government forces, aided by the United States Central Intelligence Agency.<sup>53</sup> Guatemalan authorities allowed the commission to form because there was popular demand for an accounting, but also because they imposed the condition that no names would be named. Thanks to outside funding and international assistance, the commission was able to do widespread and thorough research.<sup>54</sup>

Are truth commissions successful at achieving reconciliation? It would appear to be too soon to judge the attempts that have so far been made. Antonio Cassese, a judge of the International Criminal Tribunal for the former Yugoslavia (ICTY), has argued that only

<sup>47</sup> D.P.P. v. T., *supra* note 44.

<sup>48</sup> See Drozdziak, *supra* note 41.

<sup>49</sup> Judiciary Act of 1789, ch. 20, §9b, 28 U.S.C. §1350 (1994).

<sup>50</sup> Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); see also Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (a case by Guatemalans against a former Guatemalan Defense Minister under the Alien Tort Statute).

<sup>51</sup> Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AJIL 461, 464 (1989).

<sup>52</sup> Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031, 2100 (1998). Compare, however, fact-finding commissions, such as the one sent by the Security Council to the former Yugoslavia to investigate human rights abuse prior to the establishment of the international tribunal.

<sup>53</sup> See Mireya Navarro, *Guatemala Study Accuses the Army and Cites U.S. Role*, N.Y. TIMES, Feb. 26, 1999, at A1.

<sup>54</sup> See *id.*

through trials and punishment of wrongdoers can societies reach reconciliation.<sup>55</sup> On the other hand, Chayes and Chayes have argued that a truth commission would perhaps have been a better solution for achieving reconciliation in Bosnia.<sup>56</sup>

Despite some question regarding their efficacy, international criminal courts are the mechanism *du jour*. Two currently exist—one for the former Yugoslavia and one for Rwanda. A third is being formed to serve as a general court. Another has been proposed for Cambodia. These Tribunals apply international law and each has in turn expanded to some extent the scope of the legal rules to be applied to individuals fighting in internal conflicts. The ICTY has found that individuals may be held responsible for violations of common Article 3 of the Geneva Conventions, for violations of the laws and customs of war and for crimes against humanity; but, unlike the Danish court in *D.P.P. v. T.*, it has not so found for grave breaches of the Geneva Conventions. The Rwanda Tribunal has convicted persons for genocide in an internal conflict on the basis of its Statute and the Genocide Convention, which contain no limitations regarding armed conflict. The new international criminal court will further expand the law applicable to individuals during internal armed conflicts.<sup>57</sup>

Why have policy makers turned to international tribunals? In examining whether international tribunals have succeeded in achieving the goals of their founders, Professor Alvarez, in an article that could well be used to demonstrate ILP, distilled a list of those goals.<sup>58</sup> He has found that the creators believed they would:

- threaten those in positions of power to deter further violence;
- make possible atonement of the perpetrators and honor the dead;
- provide a mechanism to enable victims and their families to receive needed psychological relief, identify remains, restore lost property, and otherwise help heal wounds;
- channel victims' thirst for revenge toward peaceful dispute settlement;
- affirm the Nuremberg Principles at the international level while restoring faith in the rule of law generally;
- tell the truth of what occurred, thereby preserving an accurate historical account of barbarism that would help prevent its recurrence; and, perhaps most important,
- restore the lost civility of torn societies to achieve national reconciliation.<sup>59</sup>

Alvarez summarizes these many goals in the concept of "closure." In an analysis of the ICTY appeals chamber's decision on the scope of the Tribunal's jurisdiction, in *Prosecutor v. Tadić*,<sup>60</sup> he doubts whether closure was actually achieved in that case or in any case before international or domestic tribunals. Nevertheless, he finds that such trials do serve a very real purpose, that of "'civil dissensus' wherein trials stimulate further dialogue

<sup>55</sup> Antonio Cassese, *Reflections on International Criminal Prosecution and Punishment of Violations of Humanitarian Law*, in *POLITICS, VALUES AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY* 261 (Jonathan I. Charney et al. eds., 1997).

<sup>56</sup> Abram Chayes & Antonia Handler Chayes, *After the End*, in *THE WORLD AND YUGOSLAVIA'S WARS* 215 (Richard H. Ullman ed., 1996).

<sup>57</sup> The Rome Statute of the International Criminal Court extends individual responsibility to violations of the prohibitions of Additional Protocol II to the Geneva Conventions applicable to armed conflict not of an international character. The statute refers to these as "within the established framework of international law." Rome Statute of the International Criminal Court, July 17, 1998, Art. 8, UN Doc. A/CONF.183/9\*, *reprinted in* 37 ILM 999 (1998). *See also* Leila Sadat Wexler & S. Richard Carden, *A First Look at the 1998 Rome Statute for a Permanent International Criminal Court: Jurisdiction, Definition of Crimes, Structure and Referrals to the Court* (Working Paper Series No. 98-10-1, Washington University School of Law). The statute maintains, however, the limitation of the application of the grave breaches provisions to international conflicts.

<sup>58</sup> Alvarez, *supra* note 52.

<sup>59</sup> *Id.* at 2031-32.

<sup>60</sup> *Prosecutor v. Tadić*, Jurisdiction, No. 1T-94-1-T (Aug. 10, 1995) [hereinafter *Tadić Trial Chamber*]; *Prosecutor v. Tadić*, Appeal on Jurisdiction, No. 1T-94-1-AR72 (Oct. 2, 1995), *reprinted in* 35 ILM 32 (1996) [hereinafter *Tadić Appeals Chamber*]. These decisions are also available at <www.un.org/icty>.

regarding the issues on which they focus."<sup>61</sup> He also considers which mechanisms might have worked better to achieve the purposes policy makers had sought in forming tribunals.

Governments established the current Tribunals in response to popular pressure, which in turn was responding to all the goals recited above by Professor Alvarez. On the other hand, the United States had some further reasons for the strong lead it took in establishing the ICTY. It did not want to send troops to Yugoslavia. To show, however, that it was not callously ignoring the human rights abuse occurring there, the United States strongly supported the establishment of the ICTY.<sup>62</sup> Under the Clinton administration, when the United States was willing to become involved militarily, the case had been made for human rights accountability and remained part of United States policy. Moreover, the ICTY was seen as a method of neutralizing some of the individuals who could undermine the Dayton Accords.

According to Ambassador Richard Holbrooke in his book about the negotiation of the Dayton Accords: "We remained deeply concerned with human rights and war criminals; Dayton had to be about more than a political settlement."<sup>63</sup> The Accords provided that IFOR, the multinational military implementation force, would aid the ICTY in apprehending indicted individuals, though within limits. During the implementation phase of the Accords, U.S. military commanders of IFOR invoked the limits, refusing to arrest Karadžić or other high-profile individuals who had been indicted for serious war crimes. Their concern was the backlash any such arrest would cause, putting their personnel in danger. Holbrooke rails against this attitude, arguing that if these accused war criminals were not held accountable for their crimes, the chance that the Dayton Accords would succeed was small.

While the arrest of Karadzic would not have solved all the problems the international community faced in Bosnia, his removal from Bosnia was a necessary, although not sufficient, condition for success. As we had told the President and his senior advisors before Dayton, Karadzic at large was certain to mean Dayton deferred or defeated. Nothing had changed six months later, except that Karadzic was rebuilding his position. While the human-rights community and some members of the State Department, especially John Shattuck and Madeleine Albright, called for action, the military warned of casualties and Serb retaliation if an operation to arrest him took place.<sup>64</sup>

The success or failure of the ICTY will have a lasting effect on future attempts to address the issue of human rights abuse. As decision makers go through the process of developing mechanisms, they will undoubtedly examine the results of prior attempts. Did these efforts at creating new international courts and expanded rules actually result in decreasing the number of atrocities? Did they succeed? Roberts concludes regarding the ICTY: "The Yugoslavia Tribunal merits support, but at the same time there is a need for an understanding of the inherent difficulties of the tasks with which it is entrusted."<sup>65</sup> In general, he points out:

Implementation of rules of conduct in war is usually best achieved when parties to a conflict have a political and military culture, and a perception of their own interests, which is broadly favorable to observance. Implementation is therefore largely a matter of proper preparation in peacetime. States, their armed forces, their

<sup>61</sup> Alvarez, *supra* note 52, at 2035.

<sup>62</sup> See Roberts, *supra* note 35, at 57.

<sup>63</sup> RICHARD HOLBROOKE, *TO END A WAR* 261 (1998).

<sup>64</sup> *Id.* at 338.

<sup>65</sup> Roberts, *supra* note 35, at 73.



governments, and their legislatures, are among the most important entities for implementing the laws of war. Securing compliance by states or non-state entities after there have been violations of the rules is just one small part of the much broader process of implementation.<sup>66</sup>

This conclusion hardly bodes well for implementation of the new rules on internal conflicts, particularly where the state has broken down, and belligerents are not from well-established, well-trained armed forces. The mechanisms and rules described above may have some demonstration effect, but the existence of the ICTY failed to prevent serious human rights abuse in Kosovo.

### *New ILP*

New ILP, like the classic form, would equally look at what is happening in the real world but could also address the question, What *should* be happening? Policy makers and decision makers should be striving to implement international society's values in confronting the issue of abuse of human rights and accountability in internal conflict. Those values were once the values of the state system, which limited individual accountability for human rights abuse in such conflict. New ILP suggests that today the values are broader, incorporating the insights of various new legal theories to conclude that individuals should be held accountable under international law for human rights abuse, regardless of the setting in which it occurs. An understanding of the goals of the method makes it possible to shape procedures to achieve those goals. Procedures could be shaped for each of the mechanisms described above. Given the limits of the symposium format, however, the additional insights of new ILP will be applied here to just one of the mechanisms, the ICTY. Of all the mechanisms, the ICTY has been chosen because of the emphasis on institutional settlement in LP and because new American legal process is best developed in the area of judicial decision making. It makes sense, therefore, to borrow from LP's judicial decision-making analysis in attempting to demonstrate an application of new ILP.

Focusing just on the case of *Prosecutor v. Tadić*, we find that the appeals chamber had to decide whether it could apply various customary and conventional rules to Tadić regardless of whether the actions he was accused of occurred in an internal or an international armed conflict. The ICTY found that crimes against humanity were applicable under customary international law, such crimes entailing individual responsibility, even during internal conflict.<sup>67</sup> It also found that the laws and customs of war apply to internal conflict. On the other hand, it ruled that the "grave breaches" regimes of the Geneva Conventions could not apply to internal conflict. Analyzing this part of the decision through the prism of new ILP results in a different conclusion.

Crimes such as willful killing, theft of civilian property, failure to observe proper treatment of prisoners, or improper conduct in occupied territory may fail to reach the threshold of crimes against humanity. They could, nevertheless, be considered grave breaches of the Geneva Conventions. The ICTY appeals chamber in *Tadić* analyzed Article 2 of the Conventions in detail and decided that it could not hold an individual accountable for grave breaches in internal conflict, unlike the Danish Court in the decision discussed above. New ILP would support the Danish Court's decision.

<sup>66</sup> *Id.* at 17.

<sup>67</sup> Crimes against humanity are defined in Article 5 of the Statute of the ICTY as including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts "when committed in armed conflict, whether international or internal in character, and directed against any civilian population." Statute of the International Tribunal for the former Yugoslavia, UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993).

It is certainly true that new ILP advocates reliance on authority, such as explicit language of a widely adopted treaty, including Article 2 of the Geneva Conventions. The ICTY also referenced the intentions of the states that adopted the Conventions: "States parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts—at least not the mandatory universal jurisdiction involved in the grave breaches system."<sup>68</sup> Moreover, the International Committee of the Red Cross, which is charged with implementing the Conventions, has stated that individual responsibility for grave breaches is restricted to international armed conflict.<sup>69</sup>

On the other hand, new ILP supports dynamic decision making in light of contemporary norms. In the fifty years since the adoption of the Geneva Conventions, human rights norms *have* evolved, as has the incidence of noninternational and mixed armed conflicts. The wider purposes of the human rights and humanitarian law regimes, as distinct from the purposes of the states party to the Conventions when they were adopted, support individual responsibility during any armed conflict, regardless of internal or international character. Even for the good of the legal system, despite the explicit treaty language, ILP would have supported a decision that ended the now-artificial distinction between internal and international armed conflict for the purpose of applying humanitarian law.<sup>70</sup> The ICTY should have dissolved the distinction for three reasons: it results in an irrational legal regime for regulating conduct in armed conflict; the purposes of the humanitarian law regime and international society's normative values no longer support it; and sufficient state practice and *opinio juris* exist to support the change.

Consider first the regime that results from the appeals chamber's decision. The decision requires courts and tribunals to make the difficult determination of whether a conflict is internal or international in nature prior to holding individuals criminally responsible for those grave breaches which do not also constitute genocide or crimes against humanity. The appeals chamber found that the Bosnia conflict had the characteristics of both an international and an internal conflict, depending on time and facts. However, it found no need to analyze the time and facts surrounding Tadić's activities because he was being tried for crimes against humanity and other war crimes, as well as for grave breaches. Regarding crimes against humanity and war crimes, the appeals chamber held that customary international law had developed to the point of providing individual criminal responsibility in both internal and international conflicts for these charges. Thus, the chamber could exclude the charge of grave breaches in Tadić's case, yet still reach all accusations against him. When a court finds, however, that a conflict was predominantly internal, then any indictment must carefully exclude crimes that appear only under the grave breaches regime but not customary international law. The holding in *Tadić* could leave courts contemplating such fine distinctions as those in the following two examples.

<sup>68</sup> *Tadić Appeals Chamber*, *supra* note 60, para. 80.

<sup>69</sup> International Committee of the Red Cross, Some Preliminary Remarks on the Setting-Up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia, Doc. DDM/JUR/422b, at 2 (Mar. 25, 1993). See also Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadić*, 36 VA. J. INT'L L. 687, 714 (1996).

<sup>70</sup> Elsewhere I have supported the maintenance of the distinction for purposes of determining the legality of third-party intervention in armed conflict. The rule on nonintervention has different purposes than humanitarian rules, however, and so no conflict is seen with the argument that maintaining the distinction for human rights and humanitarian obligations makes little sense today. See Mary Ellen O'Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, in *POLITICS, VALUES AND FUNCTIONS*, *supra* note 55, at 443.

- An individual could be charged with a "crime against humanity" for torturing civilians, but torturing combatants is classified as a "grave breach."<sup>71</sup> Therefore, a hypothetical court trying an individual who committed both such acts during an internal conflict would address the torture of civilians but would not address the torture of combatants. The court might then turn to whether the torture of the combatants violated the customary laws of war.
- Facing the same hypothetical court under the same circumstances, an individual could be charged with the "plunder of public or private property,"<sup>72</sup> but not "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."<sup>73</sup> The first is a crime against humanity, the second a grave breach. The property destruction, again, might or might not violate the customary laws of war.

Not only does the appeals chamber decision result in an impractical, even irrational regime for regulating armed conflict today, its conclusion is not consistent with the overall purpose of the human rights and humanitarian regimes applicable to armed conflict, or with the broader norms of contemporary international society. As discussed in part I, respect for human rights is one of the metanorms of contemporary society. While the ICTY was able to hold Tadić responsible under four of the five jurisdictional provisions of its Statute, other courts and tribunals may have perpetrators from internal armed conflict charged only with grave breaches. For these cases, the ICTY has raised an obstacle to their taking jurisdiction, making the Tribunal's position inconsistent with the trend toward holding individuals accountable for serious human rights violations. The overwhelming support for the new international criminal court is testimony to the values of the international community. Indeed, even one of the few states that voted against the statute, the United States, actually supports holding individuals responsible for violations of "grave breaches" in internal armed conflict.<sup>74</sup>

Today, international society supports individual accountability for serious crimes of all kinds in armed conflict, whether internal or international. The appeals chamber itself admitted, "[W]e are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights—which . . . tend to blur in many respects the traditional dichotomy between international wars and civil strife."<sup>75</sup>

True, the ICTY had to overcome the problem of the Conventions' reference to conflicts involving "two or more High Contracting Parties" for the application of uni-

<sup>71</sup> Article 2 of the Statute of the ICTY provides:

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

ICTY Statute, *supra* note 67, Art. 2.

<sup>72</sup> Tadić Appeals Chamber, *supra* note 60, para. 86.

<sup>73</sup> *Id.*, para. 79.

<sup>74</sup> *Id.*, para. 83.

<sup>75</sup> *Id.*

universal jurisdiction. As several have advocated, it could have found that the crimes listed as "grave breaches" are now part of the customary law of armed conflict applicable to internal conflict, along with universal jurisdiction to hold perpetrators accountable; or that there is no longer a meaningful distinction between grave breaches and the customary laws of war—as the hypotheticals above suggest. Indeed, the only example of a grave breach that is *not* a crime against humanity or a violation of the customary laws of war is probably the denial of a fair trial.

Sufficient state practice and *opinio juris* exist to permit the view that, through the operation of custom, the "grave breaches" regime can now be applied to internal armed conflict. The appeals chamber found the U.S. position a positive step in the direction of a new customary rule, but insufficient without other practice to change the clear text of widely adhered-to treaties. On the other hand, treaty rules may be modified or changed through subsequent practice amounting to the development of a new rule of customary law.<sup>76</sup> With regard to including grave breaches, evidence of a rule of custom appears almost as solid as for the other rules discussed by the Tribunal, such as individual responsibility for crimes against humanity in internal conflicts.<sup>77</sup> The evidence was certainly solid enough for a duly established decision maker to find a new rule. The appeals chamber cited the German military manual as including some violations of common Article 3, pertaining to internal conflict, in the "grave breaches provision." It also cited an agreement among the conflicting parties in Bosnia-Herzegovina that provides for prosecution and punishment of those responsible for grave breaches.<sup>78</sup> In addition, the appeals chamber cited the Danish case discussed above, *D.P.P. v. T.*<sup>79</sup>

Furthermore, the ICTY interprets Article 3 of its Statute to provide it with jurisdiction over all serious violations of international humanitarian law, except those among the "grave breaches" of the Geneva Conventions, as now being part of customary humanitarian law. The Tribunal even went as far as including individual responsibility for violations of Additional Protocol II and common Article 3 as part of customary humanitarian law—once again, making their exclusion from the "grave breaches" regime mostly irrelevant.<sup>80</sup>

In a separate opinion, Judge Abi-Saab argued for applying grave breaches to internal conflict. He called on the Tribunal to take the opportunity to rationalize the law in light of new normative developments, writing:

As a matter of treaty interpretation—and assuming that the traditional reading of "grave breaches" has been correct—it can be said that . . . new normative substance has led to a new interpretation of the Conventions as a result of the "subsequent practice" and *opinio juris* of the States parties: a teleological interpretation of the

<sup>76</sup> See LOUIS HENKIN, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS (1989 IV), revised and republished as INTERNATIONAL LAW: POLITICS AND VALUES 13, 24–25 (1995).

<sup>77</sup> The Tribunal cites only three examples where no nexus between crimes against humanity and armed conflict is mentioned to support the proposition that the Tribunal can hold individuals responsible for such crimes regardless of the existence of an armed conflict or the nature of the conflict—international or internal. The references are to Control Council Law No. 10 of December 20, 1945, and the international conventions against genocide and apartheid. *Tadić Appeals Chamber*, *supra* note 60, para. 140. The Tribunal also cites two examples of state practice *contrary* to its conclusion: the Nuremberg Charter, which first mentions the crime but requires a connection to an armed conflict (the conflict with which the Nuremberg Tribunal was concerned was certainly international in nature); and the General Assembly resolution affirming the Nuremberg Charter, which carried over the requirement of a connection to an international armed conflict. The Tribunal dismisses these counterexamples as without "logical or legal basis" for the requirement of a connection. *Id.*

<sup>78</sup> *Tadić Appeals Chamber*, *supra* note 60, para. 83.

<sup>79</sup> *D.P.P. v. T.*, *supra* note 44.

<sup>80</sup> *Tadić Appeals Chamber*, *supra* note 60, paras. 127, 134.

Conventions in the light of their object and purpose to the effect of including internal conflicts within the regime of "grave breaches."<sup>81</sup>

### III. INTERNATIONAL LEGAL PROCESS COMPARED

Comparison, like application, should help to clarify what any legal method is about. This section compares ILP with the other methods in the symposium. Comparing ILP with positivism reveals that ILP builds on positivism and so has much in common with it. It also shares much with the New Haven approach, though ILP can be distinguished in ways similar to the distinctions American legal process scholars drew between themselves and the legal realists. As for the other methodologies, new ILP can surely draw on critical legal studies to understand international law's pathologies, as well as insights from law and economics and feminism to determine what the values of the system should be. Moreover, much of the study of international relations is today consistent with classic ILP's interest in the role of law and institutions in international relations and how institutions, in particular, can be improved. Each of these methods will be contrasted, in turn, with ILP below.

Classic ILP is something of an adjunct method to positivism—it is positivism that ILP is seeking to understand and the role of positive international law in international affairs that is being analyzed. Positivism's values are assumed. ILP departed from formal positivism in not focusing solely on the content of rules and their analysis, and the argument that rules should be observed because they are law. New ILP departs from positivism far more than classic ILP because it incorporates values beyond those of the state system and it challenges positivism's doctrine of sources in the achievement of those values. As demonstrated in the previous section, even where treaties and customary rules do not fully support an outcome, a duly established international law decision maker should reach the outcome that supports society's values, if it can do so under certain principles of decision.

As an adjunct to positivism, classic ILP shares positivism's great advantage, its claim to legitimacy not found in other methods, including new ILP. Positivism can arguably demonstrate its legitimacy. For any supplement to it to be accepted, the method must in some sense be authorized or legitimated by the community.<sup>82</sup> Arguments for new ILP's legitimacy have yet to be made, but would presumably urge that when states or organizations of states have established institutions for decision making, their decisions are legitimate (provided that the institutions follow correct procedure to reach their decisions). Though formalist legal doctrine suggests otherwise, it is the very nature of some of these institutions that they will clarify ambiguities in the law, fill gaps, and thus make law beyond the consent of states. The act of applying a treaty or a rule of custom will necessarily involve interpretation, clarification and/or addition. When international courts and tribunals or other institutions are established, this fact has to be recognized. New ILP simply advocates providing guidelines for these decisions so that decision makers support society's values, not just their own.

<sup>81</sup> *Id.*, Separate Opinion of Judge Abi-Saab, at 6 (on file with author).

<sup>82</sup> See Douglas M. Zang, *Frozen in Time: The Antarctic Mineral Resource Convention*, 76 CORNELL L. REV. 722, 735 (1991):

A precondition to the existence of any legal order is recognized authority. Whether the authority comes from a formalized "rule of recognition," or from a fluid set of shared community values, the existence of some basic norm from which all valid legal principles originate distinguishes a legal order from a system based upon the arbitrary exercise of power. In international law the fundamental source of authority is consensus in the recognition of the legitimacy of a legal norm.

While legitimacy may be positivism's greatest strength, its central weakness, a weakness raised by practitioners of critical legal studies, is its indeterminacy or seeming subjectivity, especially in finding rules of customary international law.<sup>83</sup> Moreover, the contemporary needs of the international legal system simply cannot be met through the slow, cumbersome means of multinational treaty making or the inscrutable means by which we determine customary law. ILP can provide justification for the outcome of ever more decisions in international law today, decisions wanted by international society, especially when they support peace, human rights or the environment. With ILP's further refinement, it can fill the methodological gaps of positivism, becoming a truly valuable method for resolving issues of ambiguity and filling gaps in an efficient, principled way.

For it to function in this role adequately, international legal scholars will need to think about how the norms of the international community are identified. This is a central element in the proper working of new ILP. Positivism can rely on the positive law tests to determine what counts as international law. Hart and Sacks defined the norms of the legal system for American legal process as democratic principles, but doing so for ILP could invite the problems faced by the New Haven School. New Haven is interested, like the American legal realists, in legal process and in promoting social policy through law. And like Legal Realism, it has been subjected to the heavy criticism that its policies and norms are those of its creators and that they were too closely tied to the interests of the United States to be the norms of the international community.<sup>84</sup> New ILP could encounter the same criticism—what substantiates the norms it supports? Are they based on the subjective view of scholars only? American legal process developed in part to support the distinction between objective law and subjective policy, while retaining normative principles. New legal process will need to develop the same distinction. But legal process had a theory of law and society that helped it to develop this distinction—namely, the theory of democracy. New ILP requires a similar theory of international law and international society.

Some insights into such a theory and certainly the norms that international law should support can be found if ILP scholars follow the lead of new legal process in looking to other norm-oriented international methodologies, such as feminism, law and economics, liberalism, and so on, to formulate a more objective view of true international community values and the relationship of law to international society. Many of the issues of feminist jurisprudence can be responded to in ILP—certainly the absence of women.<sup>85</sup> Settlement of society's divisive issues by institutions should result in a more rational world order than the ad hoc system we currently have, so ILP should be viewed positively from the perspective of law and economics scholars. On the other hand, if L&E really puts "text-based interpretation [ ] even ahead of a purported efficiency-based interpretation,"<sup>86</sup> then ILP's dynamic interpretation must be criticized from the L&E perspective. Dynamic interpretation certainly starts with text but in some cases will not stop with it, for the reasons outlined above.

Of all other approaches, international relations seems to be the most symbiotic with ILP. ILP needs a theory of international society, a better understanding of the processes actually at work in the world, as well as data about which processes work well. According to Kenneth Abbott, international relations can supply all of this in performing its three

<sup>83</sup> See, e.g., ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW?* (1986).

<sup>84</sup> See Symposium, *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 ASIL PROC. 266, 271 (1985) (Remarks of Oscar Schachter), cited in Koh, *Nations*, *supra* note 5, at 2623.

<sup>85</sup> See Hilary Charlesworth, *Feminist Methods in International Law*, 93 AJIL 379, 381 (1999).

<sup>86</sup> See Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in International Conflict*, 93 AJIL 394, 399 (1999).

tasks of "description, explanation and institutional design."<sup>87</sup> In turn, ILP is clearly a legal method that should be attractive to institutionally minded scholars. New ILP empowers institutions of decision in a way traditional positivism does not. Ironically, ILP developed to respond to international relations scholars. Today much of the work done by regime scholars and others in international relations would fit neatly within classic ILP.

#### IV. CONCLUSION

Chayes, Ehrlich and Lowenfeld developed international legal process to demonstrate that law does play a role in international affairs. Looking to the pressing contemporary issue of accountability of individuals for human rights abuse in internal conflict, classic ILP cannot answer whether individuals *should* be held accountable, but it can answer whether, why and how well they *are* being held accountable. We have seen much armed conflict and little accountability until recent years. Now policy makers are responding to popular demand for greater accountability. The result has been the development of new mechanisms of accountability and expanded rules. While these responses appeal to populations agitating for change, whether they will succeed in limiting atrocities in future conflicts is a question that ILP analysis suggests may not have an affirmative answer.

New ILP, going beyond description, can answer the question, Should individuals be held accountable? Given new ILP's normativity, this version of the method not only supports the fullest accountability, but also would give international institutions the authority to decide for full accountability, despite contrary indications in positive international law.

MARY ELLEN O'CONNELL\*

#### LETTER TO THE EDITORS OF THE SYMPOSIUM†

As I started to think about how to respond to your kind invitation to participate in the symposium on method in international law, and what to write to the readers of the *Journal*, I soon noticed that it was impossible for me to think about my—or indeed anybody's—"method" in the way suggested by the symposium format. This was only in part because I felt that your (and sometimes others') classification of my work as representative of something called "critical legal studies" failed to make sense of large chunks of it whose labeling as "CLS" might seem an insult to those in the American legal academy who had organized themselves in the 1970s and early 1980s under that banner. You may, of course, have asked me to write about "CLS" in international law irrespectively of whether I was a true representative of its method (whatever that method might be). Perhaps I was only asked to explain how people generally identified as "critics" went about writing as they did. But I felt wholly unqualified to undertake such a task. Dozens

<sup>87</sup> See Kenneth Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AJIL 361, 362 (1999).

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† *Editors' note:* This contribution was originally submitted in the form of a letter. Its salutation and complimentary closing are not reproduced here.

of academic studies had been published on the structure, history and ideology of critical legal studies in the United States and elsewhere. Although that material is interesting, and often of high academic quality, little of it describes the work of people in our field sometimes associated with critical legal studies—but more commonly classed under the label of “new approaches to international law.”<sup>1</sup> In fact, new writing in the field was so heterogeneous, self-reflective and sometimes outright ironic that the conventions of academic analysis about “method” would inevitably fail to articulate its reality.

I had difficulty with the suggested shopping-mall approach to “method,” the assumption that styles of legal writing are like brands of detergent that can be put on display alongside one another to be picked up by the customer in accordance with his/her idiosyncratic preferences. It is not only that, like many others, I dislike being labeled and marketed in accordance with the logic of consumer capitalism. I am aware that from your perspective, such an attitude may seem a rather predictable and boring product of an overblown ego, the offshoot of an elitist unwillingness to put oneself up for popular scrutiny, perhaps disguising the fear that the market’s preference will not be for oneself.

But at least since Marx and McLuhan, it has been conventionally accepted that the form of the market and the value of the commodity are not independent of each other. The liberal-pluralist approach to method suggested by the image of the shopping mall or the electoral campaign is a reifying matrix that makes apparent from the plethora of styles through which we approach and construct “international law” only those qualities that appear commensurate so as to allow comparison. In the case of this symposium, the commensurability criterion suggested in your letter was contained in the request “to explain how your method helps a decision-maker or observer appraise the lawfulness of the conduct at issue and construct law-based options for the future.” To participate in the symposium on those terms, however, would have been to subsume what I think of as a variety of different, yet predominantly anti-instrumentalist, legal styles into an instrumentalist frame: “who is going to be the diplomat’s best helper?” This seemed to make no sense.

The main reason for my unease, however, may be rephrased as follows: what is the method through which I should write about the “CLS method”? The problem, I think, should be apparent. It has to do with the very structure of a liberalism from the perspective of which the symposium and the shopping mall seem eminently beneficial contexts of human interaction. The difficulty lies in the assumption that there is some overarching standpoint, some nonmethodological method, a nonpolitical academic standard that allows that method or politics to be discussed from the outside of particular methodological or political controversies. Just as political liberalism assumes itself to be a nonpolitical, neutral framework within which the various parties can compete for influence in society, so your question—your *initial* question—assumed the existence or accessibility of some perspective or language that would not itself be vulnerable to the objections engendered by the academic styles that carry labels such as “positivism,” “law and economics,” “international law and international relations,” “legal process,” “feminism” and “critical legal studies.” But there is no such neutral ground: like the shopping mall, the symposium is a mechanism of inclusion and exclusion, of blindness and insight (where were the methods of “ethics,” “natural law,” “postcolonialism” . . . ?). The problem, as I see it, is not about which of the brands of detergent is best, most useful,

<sup>1</sup> For overviews, see David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT’L L.J. 1 (1988); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT’L L.J. 81 (1991); Outi Korhonen, *New International Law: Silence, Defence, or Deliverance?* 7 EUR. J. INT’L L. 1 (1996); and the essays in *Special Issue: New Approaches to International Law*, 65 NORDIC J. INT’L L. (Martti Koskenniemi ed., 1996). See also David Kennedy & Chris Tennant, *New Approaches to International Law—A Bibliography*, 35 HARV. INT’L L.J. 417 (1994).



accessible or whatever. The problem lies in the shopping mall, or the symposium format, the way it flattens out difference and neutralizes critique, silently guaranteeing the victory of an apathetic consumerism.

Your memorandum did, however, canvass the possibility that "some of" the contributors might not wish to adopt the shopping-mall approach. Those who did not were then called upon to explain themselves. The foregoing has, I hope, provided the beginnings of an explanation. To elaborate, I need to start from elsewhere. If there is no (credible) external perspective on "method," then I need to commence from the inside, biographically as it were, and in the course of my discussion hope that my occasional substitution of the word "style" for your chosen signifier—"method"—in the above text was no slip of the pen.<sup>2</sup>

# I.

Early on, I assumed that there were available to academic lawyers several different methods from which they were to choose one or two in order to carry out their scholarly pursuits. My legal education certainly suggested to me that I needed some such method that would provide me with a standpoint (a set of problems, intellectual tools, a language) that was external to my subjective idiosyncracies, political preferences or layman's prejudices. This method would allow me to develop the distance between myself and the object of my study—international law—that would enable the production of neutral, objective, perhaps even scientific statements about it. (This is how most of the contributors to the symposium, too, have understood their task<sup>3</sup>—with the exception of Hilary Charlesworth.<sup>4</sup>) The method would guarantee that the results of my work would enjoy scientific reliability or professional respectability (which always seemed to denote one and the same thing).

The Finnish legal academy was (and still is) liberal and pluralist and readily accepted that there was no one method through which one could approach international law. One could be a positivist, a hermeneutic, a Marxist, a legal realist, a critical positivist or whatever. The main thing was that one had to be *something* other than what one was in the pureness or corruption of one's heart in order to be a good participant in the common venture of (international) jurisprudence. This was the call for objectivity, or putting aside one's idiosyncratic ideas, passions and desires. Method connoted science and science drew—so I assumed—on what is universal, not on what was particular.

Yet this academic discourse was normatively tinged. Some choices were held in more esteem than other choices. There was a story about progress in our discipline that one needed to learn in order for one's science to get going. This was a narrative about a series of methodological transformations that went somewhat like this: The origins of (international) jurisprudence lay in a naturalism that was initially theological but became

<sup>2</sup> The following text draws on my *Tyyli Metodina* (Style as Method), which appeared in MINUN METODINI 173 (Juha Häyhä ed., Helsinki 1998).

<sup>3</sup> Dunoff and Trachtman hope to find in "law and economics" "a firmer and less subjective basis for argumentation." Simma and Paulus opt for a positivist reliance on formal sources in order to avoid "arbitrariness or postmodern relativism." O'Connell chooses "legal process" as a response to realists, seeking to demonstrate how law "constrain[s]" inevitable judicial lawmaking so that it "should not be done with the view of realizing a judge's personal view of policy." Abbott is enthusiastic about international relations inasmuch as it enables both the reproduction of the distinction between "science" and "norms" and the reliable prediction of future events and design of institutions. Wiessner and Willard maintain that "policy orientation" makes it possible to address systematically the contextual concerns of the various participants in the relevant processes, while its "conscious" taking of the observer's standpoint does not amount to "complete subjectivization" but, on the contrary, increases critical awareness.

<sup>4</sup> Her feminist methodologies "may clearly reflect a political agenda rather than strive to attain an objective truth on a neutral basis."

secularized in the course of the Reformation. This was superseded in the nineteenth century by a historical school and theories of sovereignty that were themselves overtaken by a positivism of the pure form in the early twentieth. Formal or logical approaches fell, however, under the attack of various "realistic" schools, an orientation toward law as process or as a means of social engineering.

The alternative orientations of method implied in this story stood in contrast to the dominant domestic legal theory of the time. The most up-to-date jurisprudential debates as I went to law school in the 1970s espoused a continental hermeneutics that stressed the quality of legal truth as a meeting of interpretive horizons, adopting a complex *Verstehen*-language that aimed at reflecting the uncertainty that was embedded in any effort to make general statements about the law, whether understood as texts or forms of social behavior. The move from an empirical-technical to a softer, "humanist" understanding of the law, emphasis on language and on law as literature, empathy toward social agents and the ready acceptance of social or linguistic indeterminacy—all that seemed to respond adequately to the complexity of late modern social reality. Law became argumentation, "language-games," rhetoric—a linguistic practice oriented toward social reality.<sup>5</sup>

Examined from the perspective of this jurisprudential debate, international law seemed a hopelessly old-fashioned repertoire of formalist argumentative dicta. Where was complexity, the fusion of horizons, *Vorverständnis*, indeterminacy and social critique? The only methodological arguments one encountered in international legal writing seemed to be those that conventionally classed scholars as more or less "formalists" ("idealists") or "realists," depending on the degree to which they added references to treaties or policies in commenting upon recent diplomatic events. Either "method" equaled discussion about formal sources or it referred simply to techniques of finding the collections of documents from which authoritative statements about the law could be found.<sup>6</sup> On the other hand, however, from the perspective of international law as practice, much of such high-brow methodological debate seemed quite pointless. Legal disputes arose and were settled routinely; states and international organizations seemed to be quite satisfied with the services that international lawyers had to offer—however unsophisticated their methodologies might appear to the academics.

## II.

As I wrote *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, 1989) at the end of the 1980s, my aim was to examine international law from a standpoint that would be in some ways systematic, perhaps even scientific. My starting point was an observation I had made in the course of having practiced international law with the Finnish Ministry for Foreign Affairs since 1977 that, within the United Nations and elsewhere in international fora as well as legal literature, competent lawyers routinely drew contradictory conclusions from the same norms, or found contradictory norms embedded in one and the same text or behavior. I never thought that this was because they were simply cynics, manipulating the law to suit the ends of their governments. In some ways what I learned to call the law's indeterminacy was a property internal to the law itself, not introduced to it by "politics" from the outside. As I learned from David Kennedy, the legal argument inexorably, and quite predictably, allowed the defense of whatever position while simultaneously being constrained by a rigorously formal lan-

<sup>5</sup> See, e.g., AULIS AARNIO, *DENKWEISEN DER RECHTSWISSENSCHAFT* (1979).

<sup>6</sup> See, e.g., MAARTEN BOS, *A METHODOLOGY OF INTERNATIONAL LAW* (1984); SHABTAI ROSENNE, *PRACTICE AND METHODS OF INTERNATIONAL LAW* (1984).

guage. Learning to speak that language was the key to legal competence. Such competence was not mere imagination. It was not possible to say just anything that came to one's mouth and pretend that one was making a legal argument. Among other practitioners I had the ability to distinguish between the professionally competent and incompetent uses of legal language—but this ability had little or nothing to do with the identity of the norm or the behavior to be justified or criticized.

I wanted to describe this property of international legal language—its simultaneously strict formalism and its substantive indeterminacy—in terms of a general theory. Hermeneutics was helpful inasmuch as it allowed focusing on law as language. Its interpretive orientation, however, proved disappointing. The search for a “fusion of horizons” seemed altogether too vague and impressionistic to sustain a solid “method.” Looking elsewhere, I found that much in the way critical legal scholars in the United States argued sought to grasp precisely this aspect of the law: its formal predictability and substantive indeterminacy.<sup>7</sup>

In search of a method with a critical bite and with some degree of resistance to the most obvious criticisms from recent social and linguistic theory and postanalytical philosophy, I became attached to (classical) French structuralism, its differentiation between *langue/parole* (or “deep structure” and “surface”) and its ability to explain in a hard and positivist—“scientific”—way the construction of language or cultural form from a network of limited possible combinations. Following mainstream structuralism, I described international law as a language that was constructed of binary oppositions that represented possible—but contradictory—responses to any international legal problem. I then reduced international legal argument—what it was possible to produce as professionally respectable discourse in the field—to a limited number of “deep-structural” binary oppositions and transformational rules. To this matrix I added a “deconstructive” technique that enabled me to demonstrate that the apparently dominant term in each binary opposition in fact depended on the secondary term for its meaning or force. In this way, an otherwise static model was transformed into a dynamic explanation as to how the binary structures of international law (rule/exception, general/particular, right/duty, formalism/realism, sovereignty/community, freedom/constraint, etc.) were interminably constructed and deconstructed in the course of any argument, through predictable and highly formal argumentative patterns, allowing any substantive outcome. I felt I had reached a scientific optimum where I had been able to reduce a complex (linguistic) reality into a limited set of argumentative rules.

### III.

Now, however, a new problem emerged. If international law consisted in a small number of argumentative rules through which it was possible to justify anything, what were the consequences to legal dogmatics (the description and systemization of valid law) or indeed to my practice in the legal department of the Foreign Ministry? Or more accurately: I posed no question but continued writing articles about valid law and memoranda to the Minister arriving at definite interpretive statements. The rule *R* and not  $\neg R$  was valid and was to be interpreted in situation *X* in the way *Y* and not  $\neg Y$ . This seemed puzzling to my academic colleagues. Had I not just argued that international legal arguments were indeterminate and that the rule  $\neg R$  was in every conceivable

<sup>7</sup> As early examples, I am thinking particularly of David Kennedy, *Theses about International Law Discourse*, 23 GER. Y.B. INT'L L. 353 (1980); and DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987); as well as the work of Duncan Kennedy and, for example, Clare Dalton's *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

situation as valid as the rule *R* because, in fact, *R* and  $\neg R$  entailed each other? How come I now produced texts in which I interpreted treaties and practice just like any other lawyer?—as if my materials were somehow free of the indeterminacy that I claimed elsewhere to be the most striking reality of international law.

This was the problem of the relationship between academic theory/doctrine (I always have difficulty in distinguishing the two from each other) and practice, or of the relations between my (external) description of the structure of legal argument and my (internal) participation in that argument. It soon seemed clear that, however that relationship might be characterized, there was, at least, no direct logical entailment between the one and the other: external description did enhance the facility to make a professionally persuasive argument, but it did not “produce” its outcomes. Such theory/doctrine did not provide readymade solutions for social conflict, or suggest institutional arrangements that could only be “applied” and would then have the consequences they were supposed to have. Which way one’s argument as a practitioner went still depended on what one was ready to think of as the “best” (or least bad) or workable, reasonable, humane solution—as well as on what one’s client wanted. It was a merit of this theory, however, that it demonstrated that to achieve these strategic goals, the contexts of legal practice offered many different styles of argument. It was sometimes useful to argue as a strict positivist, fixing the law on a treaty interpretation. At other times it was better to conduct an instrumentalist analysis of the consequences of alternative ways of action—while at yet other times moral pathos seemed appropriate. Each of these styles—or “methods” in the language of this symposium—was open-ended in itself, amenable to the defense of whatever position one needed to defend. None of them, however, gave the comfort of allowing the lawyer to set aside her “politics,” her subjective fears and passions. On the contrary, to what use they were put depended in some crucial way precisely on those fears and passions.<sup>8</sup>

None of this is to say that lawyers are, or should become, manipulative cynics—apart from the sense that it is a crucial part of professional competence for the lawyer to be able to construct her argument so as to make it credible to her targeted audience. Outside the relationship between the argument and the context, however, there was no external “method,” no “theory” that could have proven the correctness of one’s reasoning, the standpoint that one was called upon to take as part of one’s professional practice.

What works as a professional argument depends on the circumstances. I like to think of the choice lawyers are faced with as being not one of method (in the sense of external, determinate guidelines about legal certainty) but of language or, perhaps better, of style. The various styles—including the styles of “academic theory” and “professional practice”—are neither derived from nor stand in determinate hierarchical relationships to each other.<sup>9</sup> The final arbiter of what works is nothing other than the context (academic or professional) in which one argues.

From this perspective, the tension between academic theory and practice disappears: they, too, are styles that are taken on in a particular context. The “deconstruction” I used

<sup>8</sup> There is a nice contrast in the papers of this symposium between the tropes used to connote scientific objectivity and those for moral pathos. Objectivist associations are created by the personification of the method (instead of the lawyer) as the speaker (sometimes by the use of an informal acronym: ILP, L&E, IR—perhaps also “CLS”)—“ILP speaks,” “L&E asks,” “IR theory reminds us.” The erasure of the author’s voice is precisely the consequence “method” is expected to attain. On the other hand, all authors desist from normative closure: positivist rules receive substance through (moral) interpretation; law and process awaits morality to give substance to soft law and general standards; law and economics is silent about conditions of market access; international relations only “helps” normative analysis; and the base values of policy orientation are “posited” and not defined.

<sup>9</sup> See also my *Hierarchy in International Law. A Sketch*, 8 EUR. J. INT’L L. 566 (1997).

in my book provided an effective language and a technique—but only in the academic environment that thinks highly of the linguistic conventions and cultural connotations of deconstruction. More precisely: the academic context is defined by the kinds of cultural conventions—styles—of which that kind of critique forms a part. By contrast, the languages of legal sources, “base values” or economic efficiency are effective in those contexts of legal practice that are identified precisely through those styles. To write a deconstructive memorandum for a permanent mission to the United Nations would be a professional and a social mistake—not unlike ordering a beer in a Viennese Heurigen. European rule-positivism might seem hopelessly old-fashioned in front of a postrealist American audience—while informal American arguments about policy goals or economic efficiency associate with European experience in bureaucratic authoritarianism. “Process” language might find a positive echo when debate is about the jurisdiction of international functional organizations, yet feminist styles might better articulate the concerns of activists of nongovernmental organizations, and so on.

It is hard to think of a substantive or political position that cannot be made to fulfill the condition of being justifiable in professionally competent legal ways through recourse to one or another of the legal styles parading through this symposium. The “feel” of professional competence is the outcome of style, more particularly of linguistic style. For international law in all its stylistic variations always involves translation from one language to another. Through it, the languages of power, desire and fear that are the raw materials of social conflict are translated into one or another of the idiolects expounded in the contributions to the symposium. Translation does not “resolve” those claims, but it makes them commensurate and susceptible to analysis in the professional and bureaucratic contexts in which it is used. But translation is not completely devoid of normative consequences, either.

When Kenneth Abbott in his contribution speaks about acts of massive injustice and responses to them in terms of “atrocities regimes,” not only language but also the world undergoes a slight transformation. When Dunoff and Trachtman translate “criminal law” as “a pricing mechanism,” they simultaneously effect a change in the way we understand and interpret the relevant acts. Wiessner and Willard expressly observe that their conceptual “mapping procedures” can identify “particular features and combinations of features that are problematic in specific contexts”—presumably features that “normal” legal analysis would miss. Indeed, Hilary Charlesworth’s feminist methodologies expressly focus on the ways such alternative languages create silences that sustain gendered practices. But let us not make the mistake of thinking that there is a natural legal language which these idiosyncracies seek to pervert. As Sir Robert Jennings has reminded us, all legal argument is reductionist. International lawyers

need this *reduction* of the matter to a series of issues, distinct from the arguments supporting or attacking the parties’ contentions . . . . This reduction, concentration, refinement, or processing (many expressions suggest themselves) of a case is also to an important extent to modify its character. It looks different from how it was before being reduced to, and embroidered in, the submissions.<sup>10</sup>

Though necessary, sometimes reduction (or translation) loses what is significant so that a conclusion that proceeds on that basis will seem irrelevant, unable to articulate a relevant understanding, or perhaps will positively distort a participant value. One need not be a Marxist to perceive that as the law compels the wage laborer to think of parts of

<sup>10</sup>Robert Y. Jennings, *The Proper Work and Purposes of the International Court of Justice*, in *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE AFTER FIFTY YEARS* 33, 33–34 (A. Sam Muller, D. Raic & J. M. Thuránzsky eds., 1997).

himself—his labor, his time—as a commodity, it cannot but miss many of the aspects of his life that are suspended by the labor contract. The sentimental relations with his family are severed, his ability to cater to their needs diminished by the contract. Analogously, it has been argued, for example, that systems of international copyright or protection of cultural property have excluded or failed to articulate indigenous understandings of ownership and possession, underwriting biased assumptions about art and culture.<sup>11</sup> It is a commonplace that many key notions of international law—the concepts of sovereignty, legal subjects or sources—fail to give voice to communities or informal understandings of the good in a way that may be experienced as unjust. In their different ways, the papers of this symposium suggest alternative languages that seek to deal precisely with such problems.

The distinctive contribution of alternative styles lies in their ability to shed light on mainstream law's hidden priorities, the way legal translation articulates some participant values but fails to do so for other values. Much feminist and postcolonial writing has undertaken precisely this task. The introduction of human rights or environmental claims into the law is a familiar outcome of such renewalist "imagining" earlier in the century. Nonetheless, struggle is always involved and, just as a novel legal articulation may strengthen some voices, so may it limit and weaken other voices, undermining their passionate appeal by including them as parts of bureaucratic routine.

In this way, any style of legal argument may work as a mechanism of blindness. There is, for instance, something about genocide, or massive attack on core community values, that makes the application of formal legal language about it not only irrelevant but positively harmful.<sup>12</sup> To submit such values to legal demonstration is to infect them with the uncertainties and indeterminacies that inhabit all such demonstration—the play of the rule and the exception, principle and counterprinciple, or the "canons of interpretation." How should "base values" be understood? What price should be given to the values protected or destroyed in alternative courses of action? The harm lies in the suggestion that law—in any of its stylistic transformations—may condemn evil, however massive, only if legal technique allows this, when this technique always contains a justifying principle as well: perhaps genocide by nuclear weapons resulted from self-defense, was an unintended consequence of action or was necessary to prevent some greater evil. Perhaps the acts did not fall under some definition of "war crime" or "torture," the claimant lacked *locus standi*, or the lawyer was devoid of jurisdiction.

In such cases, available professional styles are by definition unable to provide a translation for the experiences, fears and passions that are involved.<sup>13</sup> An appeal from the bench, however articulate and sincere, is always an appeal from formal authority, defined by its claim to universality and neutrality. Where the conventions about universality and neutrality break down, however—as they do at that undefined point where the very conditions of rationality are put to question, where events are singular and their objective meaning cannot be detached from their subjective sense—there a neutral (paradoxical) humanism becomes, as George Steiner once remarked, "either a pedantic artifice or a prologue to the inhuman."<sup>14</sup> What could be sillier—or more dangerous—

<sup>11</sup> See Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, in *AFTER IDENTITY: A READER IN LAW AND CULTURE* 251 (Dan Danielsen & Karen E. Feltz eds., 1995).

<sup>12</sup> I have argued this point in greater detail in *Faith, Identity and the Killing of the Innocent. International Lawyers and Nuclear Weapons*, 10 *LEIDEN J. INT'L L.* 137 (1997).

<sup>13</sup> This is not to say that any other specific language would necessarily provide a more reliable or authentic translation of those experiences, fears and passions.

<sup>14</sup> GEORGE STEINER, *LANGUAGE AND SILENCE* 87 (1985).

than to argue, for instance, that the validity of the prohibition of torture outside specific conventional frameworks is dependent on the presence of the formal conditions of customary international law?

The problem lies with the inverted relationship between what we think can be presented as legal conclusion and what as evidence for it. In legal rationality, we hope to establish the truth of a normative proposition by linking it to a factual proposition that we already assume to be true. In this way:

- (1) Does *X* have the obligation *O*?
- (2) *X* has concluded a treaty that reads that *X* should do *O*.
- (3) Hence, *X* is obliged to do *O*.

The validity of the normative conclusion (3) depends on our ability to prove that (2) is indeed true. (By "proof" I here mean only a subjective sense or a "feel" of certainty.) However, sometimes such proof is not forthcoming. We are in fact more certain of the conclusion than of the evidence. In such a case, insisting that our conclusion (3) is nonetheless a consequence of the truth of our evidence (2) will infect (3) with all the uncertainty we have about (2). We "know" that torture is prohibited. But is there in fact a treaty, binding on *X*, that would allow us to characterize the acts of certain persons, alleged to be members of the secret police of *X*, as "torture"? A host of uncertainties arise: Is the treaty applicable? Does what we can prove of the acts amount to "torture"? Were the persons in fact acting as agents of *X*? Proceeding through legal language, the fears and passions linked with "torture" are transformed. Torture becomes another "atrocities regime" (Abbott), a part of bureaucratic formalism—this form of violence is torture, that not. In an institutionalized "torture discourse," all the normal legal exceptions and defenses are available—and must be so—and we as lawyers are called upon to employ them. It can only be speculated what it may mean, socially and for ourselves, to integrate "torture" as part of the routines of bureaucratic culture instead of holding it as an exceptional evil, defying technical articulation, and grasping us, as it were, through our souls.

#### IV.

Legal styles are styles of argument, of linguistic expression. The accounts of method contained in the symposium readily accept this and seek to establish a firm relationship between that language and the world that it is assumed to reflect. In order to describe or assess the relationship between language and the world, however, there should be some way that is independent of language to which the forms of language could be compared. There is, however, no such way. The languages create worlds and do not "reflect" them. But if legal method, too, is (only) a set of linguistic conventions and relations between them, then the attempt by any method to show why it is better than its competitors in a noncircular fashion becomes impossible. *Methodenstreit* takes place (as Thomas Kuhn and others have shown) through a ritualistic exchange of expressions between closed ("auto-poietic") systems that can justify themselves only by reference to their own conclusions. None of the protagonists can be convinced by the force of the arguments of the others because one's own premises allow only the acceptance of one's own conclusions.

The reality of law, as of science, is, in this sense, historically and synchronically discontinuous. There is no methodological development that could be explained by reference to improvement, judged from the perspective of some nonmethodological standpoint; transformations of legal style are linked (in nonlinear ways) to more general changes in the contexts of social and cultural identification. For example: "I do deconstruction because I associate it with the kinds of friendship, literature and cinema that I

like " Or: "I argue as a positivist because I value effective action and do not wish to waste my time on useless babble." Instrumentalism will win the day where connotations of economic efficiency and exact measurability are preferred to moral pathos or strictures of administrative form. Positivist distinctions between law and not-law carry conviction where traditions of professional solidarity and responsibility are valued.<sup>15</sup>

It also follows that different legal language-games do not possess greater or smaller distance from something that could be called an independent "reality." The methods create their own "realities." They exist as linguistic conventions—styles—that have as such no hierarchical relationship to each other. Because we are not entitled to presume the existence of a "metastyle," it is pointless to be anxious, for example, about the relationship of academic theory/doctrine and diplomatic practice. Incommensurate objects cannot enter into contradiction: a novelist need not face an identity crisis when drafting an income tax declaration.

It follows, finally, that no special "method" exists somewhere outside the contexts of practice or theory that would lead these into some particular direction. "Method" is a style of speaking, writing and living in a relationship with others. It is not a superficial phenomenon, but it is what unifies and identifies a group of people as a community (of diplomats, practitioners, academics). It is not necessary (but is in fact altogether pointless) to assume that behind such styles there would exist individuals or communities that would "choose" their styles in accordance with what they "will"—as suggested by the image of the shopping mall (or that of a "veil of ignorance"). A group of people does not first exist as a minority and only then start to speak a minority language. It speaks a minority language—and therefore feels itself a minority.

The same applies to the various styles of law—including international law. The distant and impersonal language of authority employed by the International Court of Justice stands in sharp contrast to the passionate advocacy of Amnesty International or Greenpeace. To mix up the contexts would be a professional mistake—witness the way Bosnia was compelled to replace its initial American counsel because of the style of presentation he elected to use.<sup>16</sup> The style of a law review article on the law of the sea cannot be identical with that of a doctoral dissertation examining the argumentative structures of international law—however much having done the former might increase the facility of doing the latter. The end result falls short of being a contribution to the "law of the sea" (whatever other merit it may have) if practitioners in that field never recognize it as such.

To describe legal method as style is to bracket the question of law's referential reality. As such, it may be assumed to lead into an "anything goes" cynical skepticism, the giving up of political struggle and the adoption of an attitude of blasé relativism. This would, however, presuppose the internalization of an unhistorical and reified conception of the postmodern in which the truth of skepticism would be the only truth not vulnerable to that skepticism. But "deconstruction," too, is only a cultural or historical convention, a style with an emancipatory potential but which—just like Kantian universalism—is always in danger of being transformed into a means of status quo legitimation.

Today this universalism and the conventions of science, technique and economy associated with it are being developed into a globalized, liberal lingua franca. Not to fall under the spell of that shopping mall requires focusing on its dangers, discontinuities

<sup>15</sup> Such connotations are, however, culturally embedded and not fixed; hence, stylistic associations may sometimes take surprising turns. Strict formalism may sometimes be avant-garde—just as policy orientation may be the language of cultural conservatism.

<sup>16</sup> For Bosnia's initial team, its application and its submissions, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, 1993 ICJ REP. 3, 4–25, and 325, 326–50 (Apr. 8 & Sept. 13). For the new team and reformulated submissions, see *id.*, Judgment, Preliminary Objections (July 11, 1996) <www.icj-cij.org>.



and mechanisms of exclusion. If "deconstruction" is able to bring out that dark side, the reality of the mall at night, it may provide a means for critical identification and practice. That liberalism—like the shopping mall—can be placed under critical scrutiny only by adopting a style that breaks the liberal conventions, by adopting an ironic distance. This may be done by replacing the conventions of formalism or pathos with a radically personalizing language: by looking at legal process in terms of the play of ambition, influence and insecurity never far below the surface.<sup>17</sup>

No style is neutral. A legal language-game has no difficulty in expressing hegemony—indeed, this is what it is supposed to do. But it is also expected to articulate experiences of injustice. No language-game, however, can express every subjectively felt violation. In order to articulate violations that are repressed in the dominant language-game, a change of style may be necessary. Martha Nussbaum once pointed out that justice may sometimes be realized only by giving up the conventions of generalizability and commensurability that are typical of law—and perhaps by writing a novel.<sup>18</sup> It is not always necessary to aim that high: a letter may sometimes suffice. But a break is needed if what is sought is critical distance from that diplomatic or academic consensus to the articulation of which the styles of international law have been devoted.

MARTTI KOSKENNIEMI\*

## INTERNATIONAL RELATIONS THEORY, INTERNATIONAL LAW, AND THE REGIME GOVERNING ATROCITIES IN INTERNAL CONFLICTS

### I. INTRODUCTION: IR THEORY AND INTERNATIONAL LAW

Over the last ten years, international relations (IR) theory, a branch of political science, has animated some of the most exciting scholarship in international law.<sup>1</sup> If a true joint discipline has not yet emerged,<sup>2</sup> scholars in both fields have clearly established the value of interdisciplinary cross-fertilization. Yet IR—like international law—comprises several distinct theoretical approaches or "methods." While this complexity makes interactions between the disciplines especially rich, it also makes them difficult to explore concisely. This essay thus constitutes something of a minisymposium in itself: it summarizes the four principal schools of IR theory—conventionally identified as "realist," "institutionalist," "liberal" and "constructivist"—and then applies them to the norms and institutions governing serious violations of human dignity during internal conflicts (the "atrocities regime").

In their initial communication to the authors, the editors of this symposium posed a more pointed question: to what extent should individuals be held criminally accountable for human rights abuses in internal conflicts? That question calls for two types of responses, *doctrinal* or *positivist* (when *are* individuals criminally responsible?) and *normative* (when *should* individuals bear criminal responsibility?). These traditional forms of

<sup>17</sup> For brilliant examples, see David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 (1985); and his *Autumn Weekend*, in DANIELSEN & ENGLE, *supra* note 11, at 191. See also the concluding reflections in Hilary Charlesworth's contribution to this symposium, 93 AJIL 379, 392 (1999).

<sup>18</sup> MARTHA NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE*, esp. 35–50 (1990). See also her *POETIC JUSTICE: THE LITERARY IMAGINATION IN PUBLIC LIFE* (1995).

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<sup>1</sup> See Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AJIL 367 (1998).

<sup>2</sup> See Kenneth W. Abbott, *Elements of a Joint Discipline*, 86 ASIL PROC. 167 (1992) (discussing joint discipline).

legal scholarship, often combined, are illustrated by Steven Ratner's recent article<sup>3</sup> observing that the rules of international criminal responsibility contain "arbitrary systems"—between international and internal conflicts, wartime and peacetime atrocities and certain proscribed abuses (torture) and others that seem equally abhorrent (small-scale executions)—and arguing that the rules should be expanded to fill these gaps.

IR theory is not directly applicable to either of these inquiries. First, as a social science IR does not purport to be what Lassa Oppenheim—or the symposium editors<sup>4</sup>—might recognize as a true "legal method" capable of answering doctrinal questions, like the positivist approaches presented above by Bruno Simma and Andreas Paulus.<sup>5</sup> And like most social sciences, IR takes its "science" seriously (often too seriously), generally eschewing specific normative recommendations. An IR perspective can, however, enhance both kinds of scholarship. In general, by situating legal rules and institutions in their political context, IR helps to reduce the abstraction and self-contained character of doctrinal analysis and to channel normative idealism in effective directions.<sup>6</sup> More concretely, the visions of international politics underlying theories of IR do suggest some (often implicit) preferences for particular sources of law and normative outcomes.<sup>7</sup>

IR theory is most helpful in performing three different, though equally significant, intellectual tasks: *description*, *explanation* and *institutional design*.<sup>8</sup> First, while lawyers *describe* rules and institutions all the time, we inevitably—and often subconsciously—use some intellectual template (frequently a positivist one) to determine which elements of these complex phenomena to emphasize, which to omit. The carefully constructed models of social interaction underlying IR theory remind us to choose these templates carefully, in light of our purpose. More specifically, IR helps us describe legal institutions richly, incorporating the political factors that shape the law:<sup>9</sup> the interests, power, and governance structures of states and other actors; the information, ideas and understanding on which they operate; the institutions within which they interact.

IR scholars are primarily concerned with *explaining* political behavior—recently, at least, including law-related behavior. Especially within those schools that favor rationalist approaches, scholars seek to identify the actors relevant to an issue, the factors (material or subjective) that affect their behavior or otherwise influence events, and the "causal pathways" by which those factors have effect. These elements are typically incorporated in a model that singles out particular factors for study. In designing research, scholars

<sup>3</sup> Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237 (1998).

<sup>4</sup> See Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Reviewers*, 93 AJIL 291, 291–92 (1999).

<sup>5</sup> Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AJIL 302 (1999).

<sup>6</sup> This is also a virtue of the New Haven approach, which shares IR's roots in political science. See Siegfried Weisner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AJIL 316 (1999). The IR approaches described here differ from the New Haven School in two major ways: (1) they focus on relatively specific sets of variables, rather than the entire global social process, creating greater theoretical parsimony; and (2) they at least attempt to separate analysis from normative or policy goals. On the latter point, both Simma/Paulus and Dunoff/Trachtman are correct in arguing that the New Haven School has tended to "ideologize" international law, and has too easily assumed a common global set of values. See Simma & Paulus, *supra* note 5, text at note 21; Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AJIL 394, 408 (1999). Weisner and Willard in this symposium exhibit these characteristics far less than some proponents of the New Haven approach.

<sup>7</sup> Legal methodologies also mask implicit preferences. Even Simma and Paulus, who emphasize rigorous positivism, search for doctrinal "strategies" to overcome normatively troublesome gaps in legal text and practice. Simma & Paulus, *supra* note 5, at 311.

<sup>8</sup> Cf. Abbott, *supra* note 2, at 168 (suggesting similar intellectual tasks).

<sup>9</sup> The political perspective is shared by sophisticated legal scholars. See, e.g., Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 22 (1989 IV) ("First, law is politics.").

look for ways to test explanatory hypotheses, using case studies<sup>10</sup> or data analysis.<sup>11</sup> Like their counterparts in other social sciences, then, the rationalist schools of IR theory share a common methodological orientation with economics, as described by Jeffrey Dunoff and Joel Trachtman in this symposium.<sup>12</sup>

A scholar applying IR theory might treat legal rules and institutions as phenomena to be explained ("dependent variables"). What factors, one might ask, led states in 1949 to adopt the Geneva Conventions, codifying detailed standards of battlefield conduct but drawing sharp distinctions between "international armed conflicts" and other violent situations? (Those "schisms"—senseless from a moral perspective<sup>13</sup>—might prove less arbitrary as a matter of politics.) Alternatively, IR might analyze legal rules and institutions—including the processes of legal decision making<sup>14</sup>—as explanatory factors ("independent variables"). One might ask, has the existence of the International Criminal Tribunal for the former Yugoslavia (ICTY), or the way it has handled cases, affected the behavior of governments and other actors in the Balkans? If so, by what means?

Why should a lawyer care about questions like these? Analyses treating law as a dependent variable are valuable in many settings, for they help us understand the functions, origin and meaning of rules and institutions. Analyses treating law as an independent variable are also valuable (though unfortunately less common): they help us assess the workings and effectiveness of legal arrangements in the real world. Both forms of explanation, then, are valuable in their own right. But explanation is at least as important for its forward-looking applications: predicting future developments and *designing institutions* capable of affecting behavior in desirable ways.<sup>15</sup> It is here—constructing law-based options for the future, as the editors put it<sup>16</sup>—that lawyers can play their greatest role<sup>17</sup> and IR can make its most significant contribution.

It bears noting, though it is probably obvious, that there is a striking contrast between the intellectual tasks presented here and the "anti-instrumentalist legal styles" described by Martti Koskeniemi in this symposium.<sup>18</sup> (Constructivist IR theory is often anti-instrumentalist, though I emphasize its concrete applications.) Undoubtedly, as Koskeniemi suggests, such contrasts are largely a matter of personal and intellectual "style." But while one's style may reflect a preferred social or cultural identification, it also reflects (and shapes) one's personal and professional goals. My goals as a lawyer, scholar and teacher, are in large part instrumental: to better understand and communicate the functions, origins and meanings of legal rules and institutions, and thereby to contribute,

<sup>10</sup> See, e.g., RONALD B. MITCHELL, *INTENTIONAL OIL POLLUTION AT SEA* (1994) (examining how rules on vessel pollution influenced compliance).

<sup>11</sup> See, e.g., Beth A. Simmons, *Money and the Law: Commitment and Compliance in International Monetary Affairs*, paper presented at American Political Science Association (Sept. 4–7, 1998) (testing competing explanations for compliance with IMF Articles of Agreement) (on file with author).

<sup>12</sup> Dunoff & Trachtman, *supra* note 6.

<sup>13</sup> On this point the International Criminal Tribunal for the former Yugoslavia stated: "Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory." *Prosecutor v. Tadić*, No. IT-91-1-AR72, Appeal on Jurisdiction, para. 119 (Oct. 2, 1995), 35 ILM 32 (1996), 105 ILR 419, *quoted more fully in* Simma & Paulus, *supra* note 5, at note 1.

<sup>14</sup> See Mary Ellen O'Connell, *New International Legal Process*, 93 AJIL 334 (1999).

<sup>15</sup> Institutional design is at the heart of current interdisciplinary collaboration. See, e.g., Slaughter, Tulumello & Wood, *supra* note 1, at 385–87; ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1995); JAMES CAMERON, JACOB WERKSMAN & PETER RODERICK, *IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW* (1996).

<sup>16</sup> Ratner & Slaughter, *supra* note 4, at 292.

<sup>17</sup> Dunoff and Trachtman describe institutional design as perhaps the lawyer's "most important creative role." Dunoff & Trachtman, *supra* note 6, text at note 1.

<sup>18</sup> Martti Koskeniemi, *Letter to the Editors of the Symposium*, 93 AJIL 351, 352 (1999).

in even a small way, to improving global governance and ultimately the human condition. Many of the intellectual approaches discussed in this symposium are valuable in this regard;<sup>19</sup> I find IR particularly helpful.

For all the potential payoff, the state of IR theory today complicates any effort to apply it to an issue like international criminal responsibility. First, the agenda, methods and terminology of IR differ significantly from traditional legal approaches, creating a "two cultures" problem.<sup>20</sup> Second, as already noted, IR is divided among contending schools, with the significance of norms and institutions a major point of contestation.<sup>21</sup> (Some speculate wryly that the traditional IR vision of the world as anarchic and conflictual reflects the discipline's own internal struggles!) Finally, while many IR scholars address international norms and institutions, until recently few have devoted much attention to distinctively *legal* norms and institutions, or to institutions involving individuals and private groups. Thus, there is relatively little IR literature analyzing the atrocities regime.

Clearly, interdisciplinary cross-fertilization must flow both ways. This essay suggests two important lessons for IR. First, IR scholarship has overlooked many issue areas in which international norms and institutions carry important consequences for individuals and states—as exemplified by the current *Pinochet* litigation. Second, most of these regimes are at least partially legalized, with legal rules, institutions, procedures and discourse that modify ordinary politics.<sup>22</sup> The legal character of international cooperation is itself a significant political phenomenon.<sup>23</sup>

## II. THEORIES OF INTERNATIONAL RELATIONS

Four visions of international politics are prominent in IR scholarship today. Within IR, each school views itself as foundational. Yet in studying complex phenomena like the atrocities regime, they frequently overlap, with each providing important insights. By explicitly contrasting and combining these approaches, I hope to weaken, if not avoid, the intellectual dilemma identified by Koskeniemi: that one can fairly describe and assess a methodology only by escaping from its particular assumptions and politics.

*Realist* theory<sup>24</sup> has dominated IR since before World War II. Realists treat states as the principal actors in international politics. States interact in an environment of anarchy, defined as the absence of any central government able to keep peace or enforce agreements. Security is their overriding goal, and self-help their guiding principle. Under these conditions, differences in power are usually sufficient to explain important events. Realists concentrate on interactions among major powers and on matters of war and peace. Other issues—even related issues like war crimes—are secondary.

<sup>19</sup> Other theoretical approaches not included here are also useful. See, e.g., Philip M. Nichols, *Forgotten Legacies—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 461 (1998).

<sup>20</sup> See Oran R. Young, Remarks, 86 ASIL PROC. 172, 173 (1992). See also Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487 (1997); Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 205 (1993).

<sup>21</sup> See John J. Mearsheimer, *The False Promise of International Institutions*, INT'L SECURITY, Winter 1994–95, at 5; *Promises, Promises: Can Institutions Deliver?* INT'L SECURITY, Summer 1995, at 39 (responses to Mearsheimer).

<sup>22</sup> Cf. Anne-Marie [Slaughter] Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993) ("the logic of law" operates to advance legal integration).

<sup>23</sup> For recent efforts to analyze international legalization, see Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *Legalization and World Politics: An Introduction*; Abbott & Snidal, *Toward a Theory of International Legalization*; Slaughter, Keohane & Moravcsik, *Legalized Dispute Resolution, International and Transnational*; and other papers to be included in a volume edited by Keohane, Slaughter, Judith Goldstein and Miles Kahler (on file with author).

<sup>24</sup> Realist theory in IR should not be confused with Legal Realism, discussed briefly in O'Connell, *supra* note 14. Although the two approaches share a belief that formal legal rules have little independent effect on behavior, their assumptions and areas of application are otherwise quite different.

Realists do not conclude that international cooperation and international law are unlikely or unimportant: states will naturally cooperate when it advances their interests. They do assert, however, that political realities constrain the commitments states will accept, and that the interests of more powerful states set the terms of cooperation.<sup>25</sup> As a corollary, realists believe that international rules and institutions have little, if any, independent effect on state behavior: they are mere ("epiphenomenal") artifacts of the underlying interest and power relationships, and will be changed or disregarded (at least on important issues) if those relationships change.

In analyzing legal doctrine (which they rarely do), realists would hew closely to the actual practice and unambiguous expressions of consent of major states. They would be deeply suspicious of efforts to establish customary law through mere verbal formulations, pronouncements of international institutions or scholarly writings.<sup>26</sup> Since even treaties frequently obligate states to do only what they would have done anyway,<sup>27</sup> or reflect political pressures rather than serious commitments, these scholars should be narrowly interpreted.

Many *institutionalist* scholars start from a similar model of decentralized state interaction.<sup>28</sup> Some share with realists a conviction that states are "real" actors with clearly specified national interests. Most, however, view states as legal fictions that aggregate the interests and preferences of their citizens; these scholars rely on state-centric analysis rather than true "methodological individualism"<sup>29</sup> because it allows for more parsimonious explanation. In either case, these theorists acknowledge a broad spectrum of interests, from wealth to a cleaner environment, that depend on cooperation. Drawing on game theory, economics and other disciplines, institutionalists identify conditions that prevent states from realizing potential gains from cooperation—"market failures," in economic terms<sup>30</sup>—and analyze how rules and other institutions can overcome those obstacles. Regime theory,<sup>31</sup> a more expansive vein of institutionalist scholarship, incorporates information and ideas as well as power and interests,<sup>32</sup> and acknowledges significant roles for private and supranational actors<sup>33</sup> and domestic politics.<sup>34</sup>

In these accounts, institutions—broadly defined to include both norms or rules and organizations—*may* have independent effects on behavior: by changing the context of

<sup>25</sup> See Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA and WTO: Regional Trajectories of Rule Development*, 91 AJIL 231 (1997) (analyzing influence of powerful states).

<sup>26</sup> See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. (forthcoming 1999) (on file with author) (applying realist approach to customary law). Simma & Paulus, *supra* note 5, at note 61 and corresponding text, argue that such efforts mock the idea of customary law.

<sup>27</sup> See George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?* 50 INT'L ORG. 380 (1996).

<sup>28</sup> See, e.g., COOPERATION UNDER ANARCHY (Kenneth A. Oye ed., 1986).

<sup>29</sup> Dunoff & Trachtman, *supra* note 6, at 397, argue that economic theory requires methodological individualism. Yet many forms of economic analysis—for example, analysis of international transaction costs, strategic interactions and market failures—can be fruitfully applied to interactions among states, as many of their examples confirm. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989) (applying economic concepts to interactions among states). One might also question Dunoff and Trachtman's conclusion, based on methodological individualism, that economic analysis requires normative support for broadly representative international institutions. At least some advocates of public choice theory argue just the opposite. See John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903 (1996).

<sup>30</sup> See Dunoff & Trachtman, *supra* note 6.

<sup>31</sup> See THEORIES OF INTERNATIONAL REGIMES (Andreas Hasenclever, Peter Mayer & Volker Rittberger eds., 1997); INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983).

<sup>32</sup> See, e.g., IDEAS AND FOREIGN POLICY (Judith Goldstein & Robert O. Keohane eds., 1993).

<sup>33</sup> See, e.g., Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 40

interaction, they facilitate the negotiation and implementation of agreements as well as other substantive interactions. For example, institutions can reduce the transaction costs of negotiation, provide unbiased information, create cognitive focal points to coordinate decentralized activities, insert neutral actors into situations of conflict, fill gaps in incomplete contracts, and facilitate the pooling of resources.<sup>35</sup> Of course, the obstacles that create a need for institutions also hamper their formation; how are institutions created in the first place? Institutionalists have made less progress in answering these "supply side" questions.<sup>36</sup>

On matters of legal doctrine, institutionalists would accept the traditional sources of international law, especially those revealing voluntary agreement among states; they would also be comfortable looking to national judicial decisions and norms promulgated by international courts and organizations. Some might even search more broadly for relevant normative expressions. In practice, though, institutionalist scholarship focuses on treaties. These are often seen as reciprocal bargains or contracts emerging from market-style interactions, a view that supports a narrow, textual mode of interpretation.<sup>37</sup> But treaties are also viewed as purposive acts akin to legislation; this vision suggests the appropriateness of the kinds of teleological interpretation supported by legal process scholars.<sup>38</sup>

Various forms of *liberal* IR theory have been influential for many years, but this approach has recently been given new vitality.<sup>39</sup> Liberals insist on methodological individualism, viewing individuals and private groups as the fundamental actors in international (and domestic) politics. States are not insignificant, but their preferences are determined by domestic politics rather than assumed interests or material factors like relative power. This approach implies that interstate politics are more complex and fluid than realists and institutionalists assume: national preferences can vary widely and change unpredictably. It calls for careful attention to the domestic politics and constitutional structures of individual states—a daunting prospect for analysts of international relations.

Liberals, on the other hand, are developing their own theoretical generalizations, using variations in domestic governance to explain differences in international behavior. For example, scholars are exploring whether liberal democratic states—with representative institutions and a commitment to the rule of law—are more amenable to legal relationships and arguments and more prone to comply with legal rules than states with different domestic regimes. Research in this vein—exemplified by Laurence Helfer and

<sup>35</sup> Dunoff & Trachtman, *supra* note 6, at 407, express a well-founded concern that institutionalists too often assume the superiority of formal institutions over more decentralized "market" interactions among states. In analyzing existing institutions, see Slaughter, Tulumello & Wood, *supra* note 1, at 375–77, one may be able to assume that states and other actors would only have created these bodies if they regarded the benefits as outweighing the costs (the principal exception would be where more powerful actors coerced weaker ones to consent). Prescriptively, however, one should compare a proposed institution to its alternatives, including the absence of institutionalization.

<sup>36</sup> One approach assumes that powerful states support the initial creation of institutions, but argues that the beneficial effects of institutions and the difficulty of replacing them allow them to maintain influence thereafter. See ROBERT O. KEOHANE, *AFTER HEGEMONY* (1984). Another approach argues that the "softness" of many international agreements reflects a balance between institutional benefits and the difficulty of creating them. See Abbott & Snidal, *supra* note 23.

<sup>37</sup> See Dunoff & Trachtman, *supra* note 6, at text following note 14.

<sup>38</sup> See O'Connell, *supra* note 14.

<sup>39</sup> See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995); Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 377 (1995); Burley & Mattli, *supra* note 22.

Anne-Marie Slaughter's analysis of supranational adjudication—is also helping to identify the domestic mechanisms through which international institutions affect behavior, and thus how they can be strengthened.<sup>40</sup>

Transnational liberals go further, highlighting the activities of private individuals and groups across national polities and within international institutions.<sup>41</sup> Traditional interest groups like business and labor, scientific communities, advocacy groups and networks concerned with issues like the rights of women or indigenous peoples,<sup>42</sup> and other private organizations all play significant roles, independently of states, in creating international rules and institutions. Such institutions may in turn function most effectively by changing the terms of domestic politics. Some liberals emphasize the role of particular organs of government—national ministries, courts, legislators—which increasingly forge their own transnational relationships.

In analyzing legal doctrine, liberals would accept traditional sources of law, but would question lawyers' easy claims of universality. Simma and Paulus, for example, argue that universal jurisdiction over genocide and crimes against humanity is "universally" recognized, on the basis of decisions in a few Western nations;<sup>43</sup> liberals might rather emphasize differences in adherence and implementation across domestic regime types. Transnational liberals, moreover, would reject doctrines that limit law creation to states. Asserting that the domestic-international distinction has broken down, they would urge the significance of transnational norms created by private actors and governmental units, as well as domestic norms.

*Constructivist* theory differs fundamentally from these rationalist accounts. Constructivists reject the notion that states or other actors have objectively determined interests that they can pursue by selecting appropriate strategies and designing effective institutions. Rather, international actors operate within a social context of shared subjective understandings and norms, which constitute their identities and roles and define appropriate forms of conduct.<sup>44</sup> Even fundamental notions like the state, sovereignty and national interests are socially constructed. They are not objectively true, but subjective; their meaning is not fixed, but contingent. Hilary Charlesworth's analysis of the construction of international law on a gendered basis disadvantageous to women is a telling example.<sup>45</sup> Even anarchy, the central concept of realism, "is what states make of it."<sup>46</sup> Many of these ideas are shared by the "English school" of IR theory, which emphasizes the subjective elements in an international "society" of states or, for some theorists, a range of private and public actors.<sup>47</sup>

<sup>40</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997). Liberal democracies may, however, resist international rules and institutions, believing their domestic systems to be adequate. *Id.* at 332–33.

<sup>41</sup> For a pioneering work, see ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977). See also BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES, AND INTERNATIONAL INSTITUTIONS (Thomas Risse-Kappen ed., 1995).

<sup>42</sup> See Hilary Charlesworth, *Feminist Methods in International Law*, 93 AJIL 379, 387 (1999) (describing lobbying efforts of women's rights groups).

<sup>43</sup> Simma & Paulus, *supra* note 5, at note 73 and corresponding text.

<sup>44</sup> For normative writings by legal scholars, see, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997).

<sup>45</sup> Charlesworth, *supra* note 42.

<sup>46</sup> Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992).

<sup>47</sup> See HEDLEY BULL, *THE ANARCHICAL SOCIETY* (1977); Barry Buzan, *From International System to International Society: Structural Realism and Regime Theory Meet the English School*, 47 INT'L ORG. 327 (1993); Andrew Hurrell, *International Society and the Study of Regimes: A Reflectivist Approach*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* 49 (Volker Rittberger ed., 1993).

Some understandings, like the Westphalian norms of sovereignty, define historical eras. More specific norms and understandings are generated, disseminated and internalized through the efforts and discourse of diverse actors.<sup>48</sup> Some constructivists emphasize the role of international organizations. Others stress the activities of scientific groups, nongovernmental organizations (NGOs) or transnational advocacy networks. In the constructivist view, even as states and other actors create norms and institutions to further their interests and values, those norms and institutions are redefining those interests and values, perhaps even the identities of the actors themselves.

In terms of legal doctrine, for constructivists all is subjective and perpetually "in play." Constructivists would look to a variety of normative expressions, including practice, to define the subjective element of custom or the meaning of treaty commitments. In addition, normative understandings vary with historical and political context.<sup>49</sup> Much as liberals see categories of states differentially amenable to law, some international society theorists see "concentric circles of commitment," with a Western core embedded in dense webs of norms and institutions, a Southern ring that participates selectively, and an outer ring on the fringes of society.<sup>50</sup>

### III. UNDERSTANDING THE ATROCITIES REGIME

This section explores how different schools of IR theory might explain three central features of the atrocities regime: the distinction between international and internal armed conflicts, the emergence of norms governing certain abuses outside of armed conflict, and the increasing reliance on criminal responsibility and criminal tribunals. As discussed earlier, the explanations IR theory offers—emphasizing political function, origin and meaning—shape and deepen our current understanding of legal rules and institutions, influence our predictions of future developments, and provide bases for reform.

To illustrate, assume we understood an international criminal tribunal functionally, as a means of deterring violations of agreed rules. We might then expect its evolution to depend on changing needs for deterrence, and might focus reform efforts on clarifying the rules, increasing the certainty of prosecution, and the like. If, however, we understood the tribunal in terms of its origins in the efforts of human rights organizations in countries experiencing atrocities, we might tie its evolution to the fortunes of those groups, and might focus reform on allowing them and the individuals they represent to appear before the tribunal. Finally, if we understood the tribunal subjectively, as embodying shared beliefs about appropriate conduct, we might link its future to the evolution of those beliefs, and might focus reform on facilitating dialogue between its judges and the community at large. If we treated these understandings as cumulative rather than alternative, we would have a rich menu of institutional improvements.

#### *Humanitarian Law in International and Internal Conflicts*

Two contrasting accounts of humanitarian law illustrate the range of explanatory approaches within IR. The first (like the first example in the preceding paragraph) is functional, state-centered and largely static; it aims at generalization. The second (combining the last two examples) encompasses private actors and normative beliefs, and is dynamic; it aims at describing the origins of a particular regime. These accounts

<sup>48</sup> See, e.g., Martti Koskeniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455, 467–78 (1996) (normative discourse at Security Council transformed identities, interests and understandings of "security").

<sup>49</sup> See Charlesworth, *supra* note 42, at 383.

<sup>50</sup> See Buzan, *supra* note 47, at 345.



also significant. Once Germany lost the ability to bomb British cities, Morrow asserts, the Allies ignored prewar pledges not to bomb civilians.

Symmetry and reciprocity help illuminate the legal distinction between international armed conflicts and other violent situations.<sup>56</sup> In international conflicts, states can anticipate reasonable symmetry between opposing forces, facilitating tit-for-tat enforcement. Here the regime is strongest: the Geneva Conventions, Protocol I and their grave breaches regimes all apply. In internal conflicts, symmetry is less likely. Since insurrectionist groups cannot ratify the Conventions, they cannot clearly signal their intentions or formally engage their reputations. Such groups often operate anonymously, hampering verification<sup>57</sup> and reciprocity. They may be unable to control their own fighters, creating noise. They may favor "dirty" tactics to counter superior forces. In these situations, states have been less willing to restrict their own operations, agreeing only to common Article 3 and Protocol II, with no grave breaches regime. (Apart from symmetry, governments may perceive internal conflicts as direct threats to survival, requiring maximum flexibility of response.) Finally, civil disturbances and terrorist actions are even more asymmetrical, and thus are not considered "armed conflicts" at all; even common Article 3 and Protocol II do not apply. Indeed, with low-level violence increasing worldwide, Protocol II actually narrowed the definition of "armed conflict" to situations involving organized dissident forces under "responsible command," where the logic of reciprocity can operate. These examples illustrate how IR theory can help lawyers predict the success of legal rules and design them to maximize effectiveness.

Martha Finnemore has adumbrated a contrasting liberal-constructivist account that sees humanitarian law as a product of private political action and an expression of social values. Finnemore traces the origins of humanitarian law to the efforts of committed private individuals,<sup>58</sup> notably the "political entrepreneur" Henry Dunant. Dunant's 1859 battlefield experiences and religious convictions led him to create what became the International Committee of the Red Cross. Within ten years, Dunant and his associates persuaded most major states to sign the first Geneva Convention, requiring aid for wounded combatants and granting protected status to medical and relief workers.

In this view, humanitarian law did not originate with states at all, but with a network of elite individuals who persuaded governments to accept it. Dunant's appeals, moreover, were based not on strategic considerations, but on morality and duty, even identity: what was appropriate for a modern "Christian nation."<sup>59</sup> The rhetoric of participating governments, too, was moralistic, not strategic. More concretely, Finnemore argues that the early history of the Convention supports a value-based interpretation. First, contrary to liberal predictions, Prussia and other authoritarian states strongly supported the Convention; Britain opposed it.<sup>60</sup> Furthermore, in early conflicts, contrary to a realist view, Prussia, Japan and other states applied the new rules unilaterally. Finally, during the Balkan Wars of the 1870s, the Red Cross decided that the Convention should apply to internal conflicts because of its humanitarian character.

Finnemore's optimistic (even idealistic) account has important implications for international lawyers. Finnemore suggests that national interests and preferences can be modified through persuasion, a conclusion relevant to institutional design as well as

<sup>56</sup> Cf. Dunoff & Trachtman, *supra* note 6, at 403 (emphasizing importance of reciprocity).

<sup>57</sup> See Kenneth W. Abbott, "Trust But Verify": *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1 (1993) (discussing information strategies).

<sup>58</sup> MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 69-88 (1996).

<sup>59</sup> The Christian theme was soon abandoned, allowing non-Christian countries to participate. *Id.* at 83-84.

<sup>60</sup> Britain's opposition was based on the belief that its policies already conformed to Convention principles. See note 40 *supra*.

political action.<sup>61</sup> Her analysis predicts widespread compliance even by nondemocratic states, and provides support for extending humanitarian law to internal conflicts.

International lawyers have a considerable stake in the accuracy of these accounts, but the evidence adduced to support them leaves many questions unanswered. If the Red Cross applied the first Geneva Convention to internal conflicts, how did the sharp international-internal distinction emerge? If some states applied that Convention unilaterally, what explains the contrary evidence from World War II? Have states with different domestic governance structures applied the rules differently in more recent times? Morrow suggests another empirical test: Do countries nearing victory disregard the rules, as his analysis implies?<sup>62</sup> Or do they continue to comply, as Finnemore's suggests? Further research could elucidate these points.

### *The Law of Peacetime Atrocities*

Why have states criminalized certain atrocities—including genocide, crimes against humanity, torture and disappearances—even outside of armed conflict?<sup>63</sup> Why are these norms so inconsistent, with genocide clearly defined as an international crime, torture subject to a prosecute-or-extradite treaty regime but considered a customary international crime, crimes against humanity also considered a customary crime but defined only (and inconsistently) in the charters of international tribunals, and disappearances criminalized only in the Americas? And why are other atrocities—e.g., small-scale political executions—treated more lightly?

Realism has limited explanatory power here. Some human rights institutions undoubtedly benefit powerful states. The Nuremberg and Tokyo trials have been criticized as victors' justice, condemning Axis leaders for atrocities Allied forces also committed.<sup>64</sup> Those proceedings, like other early actions on human rights, allowed Allied governments to distinguish themselves from the Axis for domestic political purposes.<sup>65</sup> More recently, the interests of powerful states have produced an inconsistent pattern of institutionalization. The ICTY reflects big-power concern for Balkan stability—while deflecting attention from the failure to intervene more forcefully; the more cautious response in Cambodia reflects more attenuated interests.<sup>66</sup>

More generally, a realist might emphasize the weaknesses of the atrocities regime in practice. For all the legal instruments signed since 1948, that period has seen scores of bloody conflicts and atrocities, but remarkably few criminal proceedings. There were no international prosecutions until the creation of the ICTY, and most national prosecutions have targeted former Nazis.<sup>67</sup> In Kosovo, as this is written, investigators are uncovering mass graves and civilians are still being killed and driven from their homes, yet most of those indicted by the ICTY remain at large. To a realist, none of these facts is surprising. Yugoslavia will comply with international rules when it calculates that com-

<sup>61</sup> See CHAYES & CHAYES, *supra* note 15 (emphasizing persuasion in regulatory regimes).

<sup>62</sup> Morrow's hypothesis is based on the losing side's reduced ability to retaliate.

<sup>63</sup> Crimes against humanity have historically been tied to armed conflict, but the statutes of the Rwanda Tribunal and the international criminal court reject that link.

<sup>64</sup> See Gerry J. Simpson, *War Crimes: A Critical Introduction*, in THE LAW OF WAR CRIMES 1, 5, 9, 21–23 (Timothy L. H. McCormack & Gerry J. Simpson eds., 1997) (war crimes trials create moral demarcation between trier and accused, in spite of similar conduct).

<sup>65</sup> See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 83–84 (1998).

<sup>66</sup> An ad hoc tribunal to try surviving leaders of the Cambodian Khmer Rouge is currently under consideration; it is unclear whether the current Cambodian Government will cooperate.

<sup>67</sup> See Simpson, *supra* note 64, at 8–9.

plance furthers its national interests; Western powers will respond to atrocities by the same calculation. Only the coincidence of power and interest can change this sad scenario.

Liberal and constructivist scholars present a very different picture, emphasizing the emergence of norms through private political action and evolving beliefs and highlighting their subjective effects. In this account, attitudes toward human rights are reconfiguring the norms of sovereignty that have limited international responses to internal atrocities. Simultaneously prohibiting abhorrent conduct and justifying international intervention, these normative changes are reconstituting what it means to be a state. Again, this account suggests concrete political strategies for creating new norms and concrete institutional strategies—centered on modifying normative understandings and beliefs—for designing effective regimes.

Peacetime atrocity norms clearly arose in reaction to historical events—the Holocaust and the abuses by postwar authoritarian governments, especially in Latin America. These events produced cognitive “focal points” around which public attitudes of revulsion could coalesce. But what processes turned them into law? Liberal theory leads us to focus on political activity by individuals and groups. Constructivists emphasize that this is not “politics as usual,” but a special politics rooted in values and aimed at changing values.<sup>68</sup> Yet it is still politics, “the strategic activity of actors in an intersubjectively structured political universe.”<sup>69</sup>

Individuals have been important catalysts in the emergence of human rights norms. Raphael Lemkin, moved by the Armenian massacres and concerned about Nazi intentions, began to press for international criminalization of racial and religious massacres in 1933. After losing his family in the Holocaust, Lemkin gathered evidence of Nazi atrocities, coined the word “genocide,” worked with the Nuremberg prosecutors, and lobbied for adoption of the Genocide Convention.<sup>70</sup>

Human rights NGOs played similar roles. In the 1960s, Amnesty International began its campaign against torture and related abuses. It rallied support by publicizing cases of politically motivated torture in all geographical (and ideological) regions. In the early 1980s, Amnesty helped draft the United Nations Convention against Torture. When Latin American dictatorships turned to “disappearances,” Amnesty mobilized around that issue, building support for the 1994 Inter-American Convention on the Forced Disappearance of Persons.<sup>71</sup>

Margaret Keck and Kathryn Sikkink argue that “transnational advocacy networks” (TANs) have been the crucial political actors on human rights.<sup>72</sup> TANs link international NGOs like Amnesty, local NGOs in countries suffering abuses, and supportive officials and agencies within national governments and international organizations. They adopt conscious political strategies, selecting and “framing” issues for maximum political impact, publicizing abuses in dramatic ways, exposing discrepancies between government rhetoric and practice, and seeking material leverage over target countries. Many human rights networks were energized by the 1973 coup in Chile and focused on abuses there. Their contributions to the Torture and Disappearances Conventions were crucial.

This account helps explain why some atrocities have been criminalized and others have not: simply put, TANs and NGOs have worked on those issues that are most

<sup>68</sup> See generally KECK & SIKKINK, *supra* note 65; AUDIE KLOTZ, *NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID* (1995).

<sup>69</sup> KECK & SIKKINK, *supra* note 65, at 5.

<sup>70</sup> *Id.* at 81–82, 87–88.

<sup>71</sup> *Id.* at 103–06.

<sup>72</sup> *Id.* at 1–4, 6.

conducive to political organization, dramatization and pressure. Keck and Sikkink argue that the most politically potent issues are those involving bodily harm to vulnerable individuals, like torture and disappearances, or the systematic sexual atrocities now addressed by international tribunals in response to pressure from women's groups.<sup>73</sup> Yet they do not explain why other bodily harm issues have not been criminalized. Further research might explain these differences.

As liberal theory would predict, some states appear more vulnerable than others to normative persuasion and pressure.<sup>74</sup> Keck and Sikkink find, for example, that states with liberal, law-based traditions have difficulty resisting legal or normative arguments, even if currently under authoritarian rule (e.g., Argentina). This logic suggests, however, that states without these traditions may resist normative pressures. Indeed, it implies that the widespread ratification of human rights treaties masks widely varying normative views, a form of "organized hypocrisy"<sup>75</sup> inconsistent with legal universality. Realism is also relevant here: Western governments have been reluctant to pressure strategically or economically significant states, while some target countries (e.g., China) are insulated from most forms of leverage.

Those who argue that international norms are transforming sovereignty—including many proponents of international criminal law—must recognize that some states still prefer domestic to international approaches and "truth telling" and reconciliation to prosecution. The Truth Commission in South Africa, with its broad amnesty powers, is the best example.<sup>76</sup> Yet truth-telling institutions themselves reflect new understandings of nationhood and governance. A related development is also significant: international reactions to demands for national autonomy are distinguishing among states on the basis of domestic governance.<sup>77</sup> While virtually everyone accepts South Africa's internal efforts, the Security Council rejected a domestic approach in Yugoslavia (as a sham) and Rwanda (where it might have degenerated into vengeance); legal officials involved in the *Pinochet* litigation are by and large rejecting it in Chile. IR theory is a valuable aid in mapping these evolving understandings.

### *Criminal Responsibility and Judicial Implementation*

Legal modes of thought and action permeate the atrocities regime. Proscribed conduct is treated as unlawful, not merely unacceptable; it is subject to legal proceedings, not mere political responses. For the most part, moreover, this is relatively "hard" law: the relevant treaties create binding legal obligations; they clearly define the proscribed conduct; and they delegate implementation to judicial institutions—primarily national courts (with universal jurisdiction and prosecute-or-extradite requirements to limit self-serving decisions) but increasingly international tribunals as well.<sup>78</sup> Finally, these agreements incorporate criminal law concepts, not general notions of state responsibility. How would IR theory explain these characteristics?

Realists might argue that legal approaches help powerful states control disfavored conduct. In dealing with Yugoslavia, for example, the threat of prosecution was materially

<sup>73</sup> See *id.* at 27. See also Charlesworth, *supra* note 42, at 386–87.

<sup>74</sup> KECK & SIKKINK, *supra* note 65, at 117–19, 207–09.

<sup>75</sup> See Stephen D. Krasner, paper prepared for Conference on Norms in Future International Politics, University of California at Los Angeles (Nov. 1998) (on file with author).

<sup>76</sup> For an analysis favoring a limited duty to prosecute under international law, see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

<sup>77</sup> Cf. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992) (arguing that international law is coming to require democratic national governance as condition of participation in international community).

<sup>78</sup> See Abbott & Snidal, *supra* note 23.

less costly than economic sanctions or military intervention. Governments can also depict such proceedings as apolitical acts, reducing potential political costs.<sup>79</sup> Normatively, realists would support delegation of enforcement decisions to national governments, which can consider national interests; they would accordingly support the U.S. decision not to join the international criminal court (ICC), while doubting the court's practical impact.

For institutionalists like Morrow, legalization enhances the coordinating function of agreements, whatever the underlying power relationships may be. The formality of treaties and their approval and ratification procedures allow states clearly to signal commitments;<sup>80</sup> legally binding commitments raise the political costs of violation, even for powerful states; careful drafting creates common conjectures; independent organizations provide unbiased monitoring; and courts resolve ambiguities and fill gaps.

Regime theory provides an even broader functional account of legalization. Individual criminal responsibility helps deter disfavored conduct, because of its value-laden character as well as the concrete threat of prosecution. Deterrence of individual officials is especially appealing when the alternatives—such as forcible intervention—are costly and difficult to organize. Decentralized enforcement through national prosecute-or-extradite obligations initially enabled regime architects to utilize existing institutions when the creation of new centralized institutions was politically impossible.

Decentralized enforcement, though, presents classic collective-action problems. Few states are materially affected by atrocities committed abroad,<sup>81</sup> so few governments have incentives to prosecute offenders, even if they could obtain jurisdiction. Politically, the benefits of prosecution are limited; the costs may be significant. Material resources are also limited, and governments may choose to devote them to more immediate concerns. Some states may simply be incapable of mounting prosecutions. In spite of the efforts of human rights groups, then, national prosecutions have been few in number and narrowly targeted. The public goods of prosecution and deterrence are undersupplied.

Two kinds of institutions can address such disjunctions between national and community incentives. One is a transnational enforcement process open to private complainants, which allows individuals and activist groups to vindicate international norms. Helfer and Slaughter have detailed how such "supranational" procedures spurred legal development under the European Convention on Human Rights and within the European Community.<sup>82</sup> Human rights plaintiffs have sought similar results through civil actions in national courts.<sup>83</sup> The atrocities regime includes no formal private access procedure. Informally, however, private groups supply information to international prosecutors, serving similar functions.

The second alternative is a public institution empowered to initiate cases on behalf of the community.<sup>84</sup> Examples here are even rarer; the Advocates General of the European

<sup>79</sup> British Home Secretary Straw utilized this tactic in his decision of December 1998 that authorized Spain's request for the extradition of General Pinochet to proceed.

<sup>80</sup> States often enter informal agreements to avoid domestic approval processes and provide greater flexibility. See Charles Lipson, *Why Are Some Agreements Informal?* 45 INT'L ORG. 495 (1991).

<sup>81</sup> States will have material interests when their nationals are among the victims, as with Spanish citizens in Pinochet's Chile, or when they are forced to receive refugees. States may also feel "moral externalities" from foreign atrocities. See Dunoff & Trachtman, *supra* note 6, at 404.

<sup>82</sup> See Helfer & Slaughter, *supra* note 40. See also Slaughter, Keohane & Moravcsik, *supra* note 23; G. Richard S. Stoll, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 821 (1995) (arguing for similar procedures in the WTO).

<sup>83</sup> See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996), summarized in 90 AJIL 658 (1996). See also Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (discussing such litigation).

<sup>84</sup> Cf. Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31 (1992) (recommending the development of public institutions to enforce international economic norms).

Court of Justice (ECJ) come closest, but they cannot initiate litigation. Thus, while most commentators have emphasized the creation of international criminal courts, this analysis suggests that international prosecutors are equally significant, for they can resolve the collective-action problem of enforcement.

To vindicate international norms effectively, however, prosecutors and courts must be structured not only for impartiality and expertise, but also for political independence.<sup>85</sup> Independence depends importantly on the provision of sufficient resources for fact-finding and other judicial functions, and for administrative functions like imprisonment.<sup>86</sup> It also turns on details of staffing, structure and procedure—the selection of judges, tenure, compensation, docket control, decision-making procedures—as in domestic legal systems.

These considerations must be weighed against what Duncan Snidal and I term “sovereignty costs,” the symbolic and material costs of diminished national autonomy.<sup>87</sup> Independent institutions are a major source of sovereignty costs, in part because their actions are inevitably somewhat unpredictable. The balancing of benefits and costs can be seen in the ICC statute, which gives priority to national prosecutions and limits the tribunal’s independence, notably by authorizing the Security Council to delay proceedings.

Liberals would highlight the prominent role of lawyers and legal groups in creating the criminal responsibility system. It may be natural for lawyers to characterize acts like torture and genocide as crimes, and then to address them through prosecutors and courts. In this sense, lawyers operate as a transnational, knowledge-based “epistemic community,” framing problems and solutions in legal terms for action by political institutions.<sup>88</sup> Legal approaches also serve political purposes. Characterizing conduct as criminal links emerging norms to established legal values, increasing their legitimacy; it motivates individuals and groups attuned to legal issues, including national judges; and it gives politicians neutral “cover” for potentially unpopular actions. Criminalization also supports the penetration of international norms into national legal systems.<sup>89</sup>

Constructivists would go further, emphasizing the value-laden quality of criminal law. Criminalization—the strongest form of social condemnation—reflects public revulsion. At the same time, international legal institutions can be “teachers of norms,”<sup>90</sup> shaping how governments and citizens perceive particular conduct. Actions like the Rwanda Tribunal’s genocide conviction of a former mayor, Jean-Paul Akayesu, and the guilty plea of former Prime Minister Jean Kambanda, feed back into society to reshape how individuals view governance, the duties of states and citizens, even the meaning of

<sup>85</sup> See Helfer & Slaughter, *supra* note 40, at 300–04 (analyzing structural characteristics of effective supranational courts).

<sup>86</sup> According to former presiding Judge Goldstone, as of 1997 no state had volunteered prison facilities for the Rwanda Tribunal, and only eight for the ICTY. See Richard Goldstone, *Conference Luncheon Address*, 7 TRANSNAT’L L. & CONTEMP. PROBS. 1 (1997).

<sup>87</sup> Abbott & Snidal, *supra* note 23. Conceiving of impingement on national sovereignty as a “cost” suggests that states compare that and other costs to the benefits of international cooperation, as economic analysis would suggest. See Dunoff & Trachtman, *supra* note 6, at 397–98. It also suggests that sovereignty costs vary depending on the nature of the issue, the political context, the size and power of the state in question, and other considerations; sovereignty costs can even be positive.

<sup>88</sup> “Epistemic communities” are transnational networks of individuals, private organizations, and elements of national governments and international organizations united by common knowledge, typically scientific or technical knowledge. See *Knowledge, Power and International Policy Coordination*, 46 INT’L ORG. (special issue, Peter Haas ed., Winter 1992) (analyzing epistemic communities). Knowledge-based networks appear especially successful at identifying problems, placing them on the political agenda and suggesting solutions. Another community relevant to the atrocities regime is the network of forensic scientists that has documented atrocities since the early 1980s. See KECK & SIKKINK, *supra* note 65, at 93–94, 109–10.

<sup>89</sup> KECK & SIKKINK, *supra* note 65, at 12–13, argue that NGOs in repressive states use TANs to create international norms, then use those norms to modify domestic political and legal systems.

<sup>90</sup> See Martha Finnemore, *International Organizations as Teachers of Norms*, 47 INT’L ORG. 565 (1993).

statehood and citizenship. Social and psychological forces like these may well be influential, but their influence will not be equally deep in all parts of the world. Further study of the processes of normative change seems essential.

#### IV. LOOKING FORWARD

The visions of international relations and international law presented here have significant implications for the future of the atrocities regime. Normative decisions on the content of the regime must be made through legitimate processes of government. IR theory cannot dictate those decisions, but it can inform them with an understanding of what is politically likely, and politically possible. Once the normative decisions are made, moreover, IR can help structure rules and institutions to achieve the agreed ends.

Space precludes anything like a full exposition of these issues. This section summarizes the engines of change identified by the leading schools of IR theory, then considers the special role of legal institutions in the evolution of the regime.

##### *Engines of Change*

Realists see the interests of powerful states as the principal force behind—and the major constraint on—change. This need not imply a gloomy future. To some extent, at least, the major Western powers have come to view nondemocratic regimes as political liabilities and serious human rights abuses as undermining stability.

Yet realists would expect political considerations to continue constraining national decisions in this area. Realists would also expect powerful states to influence the design of international rules and institutions in ways that preserve their own flexibility, a prediction borne out in the ICC negotiations. Normatively, of course, most realists would argue that states should act in these ways, to protect their national interests.

Finally, in response to the idealism of some approaches, realists offer cautionary advice. For one thing, legal institutions alone will not bring an end to atrocities. More fundamental approaches, some quite costly, will also be required. In particular, major states may have to apply economic or military power to produce changes in behavior, as scanty as these tactics are. Yugoslavia illustrates the point: with the NATO Stabilization Force generally unwilling to act,<sup>91</sup> the Serbian-dominated nation, only a middling power, has maintained sufficient control on the ground to frustrate the ICTY and commit new atrocities in the face of worldwide condemnation.

Institutionalists typically agree that states are major engines of change, but they emphasize the ability of international rules and institutions to change the context of interaction and facilitate cooperative action. The post-Cold War Security Council, for example, enabled states to establish ad hoc international tribunals with broad legitimacy. When such a tribunal (the ICTY) can call on a major nation (Germany) to render up an accused individual (Duško Tadić) for trial, who can doubt that international politics has changed? Other legal institutions, from the International Law Commission to the ICC, can also play important roles.

Yet institutionalists would agree that legal arrangements are only part of the solution. An effective atrocities regime must include new or improved institutions for monitoring abuses, avoiding conflict, making and keeping peace, protecting minority rights, super-

<sup>91</sup> As this was written, however, the NATO Stabilization Force arrested a prominent Serbian general, Radislav Krstić, on charges of genocide and crimes against humanity growing out of the massacres of Bosnian Muslims fleeing Srebrenica.

vising elections, and performing many other functions. Political organizations like the Security Council and the Organization for Security and Co-operation in Europe will necessarily be central players.

Liberal theorists stake out a strong predictive/normative position: the distinctions between international, transnational and domestic politics and law are artificial, inappropriate and crumbling in practice. Thus, liberals would predict and support increasing resort to individual criminal responsibility and the demise of the distinction between international and internal conflicts, on political as well as legal grounds.

Liberals see political action by individuals and private groups as the major force behind such changes. They would expect sympathetic national and supranational agencies to cooperate in these efforts. For liberals, the *Pinochet* litigation is a defining episode: a single Spanish magistrate single-handedly revitalizing the extradite-or-prosecute regime, in a case mingling abuses of citizens and foreign nationals during a predominantly internal conflict. Moreover, neither Judge Garzón's actions nor the responses of the British courts and Home Secretary are the actions of "states"; they are the law-governed actions of independent officials and organs of government.

Constructivists see numerous engines of change: historical events like the Kosovo massacres, political activity by human rights groups and TANs, governmental actions like those in the *Pinochet* case, judicial decisions like the *Akayesu* verdict. All of these provide cognitive and moral focal points for social consensus and action. Political activists are expert at framing issues in ways that mobilize political support, resonating with broadly held cognitive and ideological principles. The key for constructivists is the transformative impact such actions have on subjective understandings of interest, appropriate behavior and identity.

### *Legal Institutions as Political Actors*

Lawyers typically view courts and other legal institutions—even in politically charged areas like human rights—as "apolitical"; this is their special virtue.<sup>92</sup> To differing degrees, both positivist and legal process scholars often build on this assumption.<sup>93</sup> Recent IR scholarship, however, sees international legal institutions as intensely political actors, albeit in a special kind of politics. In this account, originally inspired by the ECJ, the political acumen of legal actors is among their most important traits, one that significantly influences the development of law and politics.<sup>94</sup>

Anne-Marie (Slaughter) Burley and Walter Mattli developed a "neofunctionalist" account of legal development, focusing on the actions of individual judges, lawyers, legal scholars and others associated with supranational courts.<sup>95</sup> All these individuals use their positions to pursue particular goals. These may include idealistic values, the interests of certain social groups, or particular legal outcomes, but they are also likely to include pure self-interest, such as professional prestige and power. One need not posit special com-

<sup>92</sup> See, e.g., Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554, 555 (1995).

<sup>93</sup> However, the seminal Chayes, Ehrlich & Lowenfeld casebook on international legal process and other works by those authors recognize both that formal legal processes play a limited role in international politics and that even formal legal processes are often politicized. This is reflected in their conclusion, see O'Connell, *supra* note 14, at 337, that law "constrained," "justified" and "organized" political action by legal decision makers, rather than supplanting it.

<sup>94</sup> Helfer & Slaughter, *supra* note 40, consider the European Court of Human Rights and the UN Human Rights Committee as well as the ECJ, and develop a "checklist" of judicial techniques for effective supranational adjudication.

<sup>95</sup> See Burley & Mattli, *supra* note 22.



commitments to community interests to explain, e.g., the role of the ECJ in expanding European law; "ruthless egoism does the trick by itself."<sup>96</sup>

Professional norms and institutional rules prevent legal actors from utilizing direct political strategies like threats and bribes. But the law offers more subtle tools. Supranational judges, for example, can utilize standing rules and other access doctrines to acquire a caseload and build a supportive constituency of litigants and lawyers. They can render decisions and craft opinions that encourage national judges to view development of supranational law as a common project, while reassuring them that their own jurisdiction will be respected. (ECJ judges courted national counterparts even more directly, through seminars, dinners and other personal contacts.) They can select cases and interpret agreements in ways that develop doctrine in desired directions. Over time, as the increasing integration of Europe demonstrates, such actions can reshape politics as well as law. Political actors will generally acquiesce so long as judges remain within the seemingly neutral and apolitical domain of law—an image that judicial craftsmanship can help maintain.<sup>97</sup>

Actors associated with international criminal tribunals will undoubtedly pursue similar strategies. Some of their strongest political tools lie in the flexible doctrines of customary international law. The ICTY appellate chamber decision in *Tadić*, for example, expanded its own jurisdiction and that of other tribunals by enunciating a customary law of war crimes in internal conflicts.<sup>98</sup> Decisions accepting or rejecting indictments, interpreting substantive bases of jurisdiction, and fleshing out relationships to national institutions can develop doctrine, build constituencies, reassure skeptical politicians, and increase institutional legitimacy. By citing each other's decisions and those of national courts, each tribunal can enhance the authority of the entire regime.<sup>99</sup>

Although access by individual litigants is limited, international prosecutors and judges can forge cooperative relationships with national prosecutors and courts, international institutions (like the NATO Stabilization Force in the former Yugoslavia), human rights NGOs with information on pending and potential cases, and other outside groups. Through speeches, articles and personal contacts as well as formal decisions, Judge Goldstone, Judge Arbour and others associated with the Yugoslavia and Rwanda Tribunals have worked tirelessly to create an international "community of law" around those institutions.<sup>100</sup> Lawyers and legal scholars are significant players in this scenario. In human rights and humanitarian law, as in other specialized areas, lawyers and academics with expertise argue for the creation of particular rules and institutions, help draft the necessary agreements, serve on the institutions they help create or argue before them, and write approvingly of the results. Politically savvy judges will take full advantage of such individuals.

Realist scholars are suspicious of this approach.<sup>101</sup> They argue that states are unlikely to be fooled by legal stratagems,<sup>102</sup> and retain the power to overturn by treaty or supranational legislation any decisions they dislike. If the ECJ promoted European integration, for example, it was because the member states wished it to. Recent analyses

<sup>96</sup> *Id.* at 54.

<sup>97</sup> Many societies are less aware of the possibilities of judicial activism than the United States, and are accordingly more acquiescent.

<sup>98</sup> See Prosecutor v. *Tadić*, *supra* note 13, para. 134, 35 ILM at 70–71.

<sup>99</sup> See Helfer & Slaughter, *supra* note 40, at 323–28.

<sup>100</sup> See, e.g., Goldstone, *supra* note 86.

<sup>101</sup> See, e.g., Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171 (1995).

<sup>102</sup> Karen Alter argues that national politicians are not fooled, but have shorter time horizons than judges because of periodic elections. Karen Alter, *Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998).

see value in both positions. Scholars are developing more sophisticated theories spelling out the conditions under which national and international judges, lawyers, litigants and other actors can cooperate to expand the influence of supranational law, and under which states and other "legislators" will acquiesce.<sup>103</sup>

#### V. CONCLUSION

The atrocities regime is a rich and fascinating area of study. Yet it is not the bare rules of the Geneva Conventions or the procedures of the ICTY that create this fascination; it is the political conflict played out in their creation and design, the struggle to imbue them with meaning, the effort to use them to modify undesirable behavior. As this symposium makes clear, many intellectual approaches can shed light on such complex social phenomena. Yet IR theory (a rich and multifaceted creation) has a particularly important contribution to make, for it has been developed—and is evolving—to illuminate just this kind of issue. IR is not a "legal method" in the narrow sense. Coupled with the study of law and legal institutions, though, it can be the cornerstone for a deeper understanding of international governance.

KENNETH W. ABBOTT\*

#### FEMINIST METHODS IN INTERNATIONAL LAW

I have mixed feelings about participating in this symposium as the feminist voice. On the one hand, I want to support the symposium editors' attempt to broaden the standard categories of international legal methodologies by including feminism in this undertaking. On the other hand, I am conscious of the limits of my analysis and its unrepresentativeness—the particularity of my nationality, race, class, sexuality, education and profession shapes my outlook and ideas on international law. I clearly cannot speak for all women participants in and observers of the international legal system. I also hope that one day I will stop being positioned always as a feminist and will qualify as a fully fledged international lawyer. My reservations are also more general because presenting feminism as one of seven rival methodological traditions may give a false sense of its nature. The symposium editors' memorandum to the participants encouraged a certain competitiveness: we were asked, "Why is your method better than others?" I cannot answer this question. I do not see feminist methods as ready alternatives to any of the other methods represented in this symposium. Feminist methods emphasize conversations and dialogue rather than the production of a single, triumphant truth.<sup>1</sup> They will not lead to neat "legal" answers because they are challenging the very categories of "law" and "nonlaw." Feminist methods seek to expose and question the limited bases of international law's claim to objectivity and impartiality and insist on the importance of gender relations as a category of analysis. The term "gender" here refers to the social construction of differences between women and men and ideas of "femininity" and "masculinity"—the excess cultural baggage associated with biological sex.

<sup>103</sup> See, e.g., Helfer & Slaughter, *supra* note 40; Geoffrey Garrett, R. Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998); Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT'L ORG. at 177.

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<sup>1</sup> See J. Ann Tickner, *You Just Don't Understand: Troubled Engagements between Feminists and IR Theorists*, 41 INT'L STUD. Q. 611, 628 (1997).

The philosopher Elizabeth Grosz has pointed out that feminist theorizing typically requires an unarticulated balance between two goals. Feminist analysis is at once a reaction to the "overwhelming masculinity of privileged and historically dominant knowledges, acting as a kind of counterweight to the imbalances resulting from the male monopoly of the production and reception of knowledges" and a response to the political goals of feminist struggles.<sup>2</sup> The dual commitments of feminist methods are in complex and uneasy coexistence. The first demands "intellectual rigor," investigating the hidden gender of the traditional canon. The second requires dedication to political change. The tension between the two leads to criticism of feminist theorists both from the masculine academy for lack of disinterested scholarship and objective analysis and from feminist activists for co-option by patriarchal forces through participation in male-structured debates.<sup>3</sup>

Feminist methodologies challenge many accepted scholarly traditions. For example, they may clearly reflect a political agenda rather than strive to attain an objective truth on a neutral basis and they may appear personal rather than detached. For this reason, feminist methodologies are regularly seen as unscholarly, disruptive or mad. They are the techniques of outsiders and strangers. Just as nineteenth-century women writers used madness to symbolize escape from limited and enclosed lives,<sup>4</sup> so twentieth-century feminist scholars have developed dissonant methods to shake the complacent and bounded disciplines in which they work. At the same time, most feminists are constrained by their environment. If we want to achieve change, we must learn and use the language and methods of the dominant order.

Feminist methods also encourage reflection on the production of knowledge by feminists.<sup>5</sup> What system of social and cultural relations is involved in writing this paper? On what economic and institutional support does it depend? I have the freedom to speak because I earn my living working in a university in a "developed" country and have time to think and write. I have been around for long enough not to have to be concerned that writing about feminism will threaten my tenure or promotion in the academy. I can engage in academic work because I share the care of my children and household with a supportive partner. More generally, I benefit from a particular conjunction of economic and political circumstances on which the opportunity for feminist theorizing depends. As Rey Chow has pointed out:

Feminism . . . belongs to a juncture in time when the Western thought's efforts at overcoming itself are still, relatively speaking, supported by a high level of material well-being, intellectual freedom, and personal mobility. . . . Even though it often, if not always, speaks the language of oppression and victimization, Western feminism owes its support to the existence of other populations who continue to experience daily exclusions of various kinds, many of which are performed at territorial borders. It is the clear demarcation of such borders which allows us the comfort and security in which to theorize the notion of "exclusion" itself.<sup>6</sup>

In writing about feminist perspectives on the law concerning human rights abuses in armed conflict, I am conscious that I am able to do so precisely because I am not at daily

<sup>2</sup> See Elizabeth Grosz, *A Note on Essentialism and Difference*, in *FEMINIST KNOWLEDGE: CRITIQUE AND CONSTRUCT* 32 (Sneja Gunew ed., 1990).

<sup>3</sup> *Id.*

<sup>4</sup> See SANDRA M. GILBERT & SUSAN GUBAR, *THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH-CENTURY LITERARY IMAGINATION* (1979).

<sup>5</sup> See, e.g., *FEMINIST CULTURAL THEORY: PROCESS AND PRODUCTION* (Beverly Skeggs ed., 1995).

<sup>6</sup> Rey Chow, *Violence in the Other Country: China as Crisis, Spectacle, and Woman*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 81, 98 (Chandra Talpade Mohanty, Ann Russo & Lourdes Torres eds., 1991).

risk of these harms. In other words, feminist "madness" in international law is only possible because our lives are neither disoriented nor mad.

Here, I want to describe two feminist methods that can illuminate the study of international law and then consider the questions they might raise in the particular context of accountability for human rights violations in internal armed conflict. These techniques can be used across the spectrum of feminist theories. Within feminist scholarship there is a tendency to pigeonhole theorists into fixed categories such as "liberal," "cultural," "radical," "postmodern" and "postcolonial." But when confronted with a concrete issue, no single theoretical approach or method seems adequate. A range of feminist theories and methods are necessary to excavate the issues. In this sense, feminist explorations can be likened to an archaeological dig.<sup>7</sup> There are various layers of practices, procedures, symbols and assumptions to uncover and different tools and techniques may be relevant at each level. An obvious sign of power differentials between women and men is the absence of women in international legal institutions. Beneath this is the vocabulary of international law, which generally makes women invisible. Digging further down, many apparently neutral principles and rules of international law can be seen as operating differently with respect to women and men. Another, deeper, layer of the excavation reveals the gendered and sexed nature of the basic concepts of international law; for example, "states," "security," "order" and "conflict."

Broad theoretical brushes may be required initially to clear the site of the obvious debris of sexist practices and increasingly refined methods to unpack and examine hidden assumptions. Use of a range of techniques, however, can lead to charges of methodological and theoretical impurity. I think that this impurity is inevitable in the analysis of complex situations. Feminist investigations of international law require "situated judgment" rather than an overarching theory to work out the most appropriate technique at any time.<sup>8</sup>

## I. FEMINIST METHODOLOGIES

### *Searching for Silences*

A methodology sometimes employed to question the objectivity of a discipline is that of detecting its silences. All systems of knowledge depend on deeming certain issues as irrelevant or of little significance. In this sense, the silences of international law may be as important as its positive rules and rhetorical structures. Permeating all stages of the excavation of international law is the silence of women. This phenomenon does not emerge as a simple gap or hollow that weakens the edifice of international law and that might be remedied by some rapid construction work. It is rather an integral part of the structure of the international legal order, a critical element of its stability.

Women are not completely absent from the international legal order: for example, a specialized area of women's human rights law has been developed and there is some specific acknowledgment of women in other areas of international law. But, by and large, when women enter into focus at all in international law, they are viewed in a very limited way, often as victims, particularly as mothers, or potential mothers, in need of protection. Even the Platform for Action adopted by the Fourth World Conference on Women held

<sup>7</sup> See NGAIRE NAFFINE, *LAW AND THE SEXES* 2 (1990).

<sup>8</sup> See Margaret Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1718-19 (1990). Donna Haraway has used a similar term, "situated knowledges," to advocate "shared conversations" on methodology that can lead to better accounts of the world than provided by a single perspective. Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Accounts of the Perspective*, 14 FEMINIST STUD. 575, 580 (1988).

in Beijing in 1995 endorses this circumscribed idea of womanhood. Debate in Beijing about what might constitute "balanced and non-stereotyped" images of women resulted in a paragraph referring to women's experiences as including the "balancing [of] work and family responsibilities, as mothers, as professionals, as managers and as entrepreneurs."<sup>9</sup> Dianne Otto has noted that this list of women's major life experiences "neatly encapsulates the dominant possibilities for women which are approved by the Platform: the traditional role of mother remains central, but is now augmented by the addition of a role in the free market economy."<sup>10</sup> Many aspects of many women's lives are obscured in this account.

One technique for identifying and decoding the silences in international law is paying attention to the way that various dichotomies are used in its structure. International legal discourse rests on a series of distinctions; for example, objective/subjective, legal/political, logic/emotion, order/anarchy, mind/body, culture/nature, action/passivity, public/private, protector/protected, independence/dependence. Feminist scholars have drawn attention to the gendered coding of these binary oppositions—the first term signifying "male" characteristics and the second "female."<sup>11</sup> Like many other systems of knowledge, international law typically values the first terms more greatly than their complements. Carol Cohn has written of her "participant observation" study of North American defense and security affairs analysts that "[c]ertain ideas, concerns, interests, information, feelings, and meanings are marked in national security discourse as feminine, and are devalued."<sup>12</sup> For this reason, they are both difficult to say and difficult to hear. They seem illegitimate, embarrassing and irrelevant.<sup>13</sup> In a similar way, the symbolic system and culture of international law is permeated with gendered values, which in turn reinforce more general stereotypes of women and men.

The operation of public/private distinctions in international law provides an example of the way that the discipline can factor out the realities of women's lives and build its objectivity on a limited base. One such distinction is the line drawn between the "public" world of politics, government and the state and the "private" world of home, hearth and family. Thus, the definition of torture in the Convention against Torture requires the involvement of a public (governmental) official.<sup>14</sup> On this account, sexual violence against women constitutes an abuse of human rights only if it can be connected with the public realm; for example, if a woman is raped by a person holding a public position for some type of public end. The Declaration on the Elimination of Violence against Women, adopted by the General Assembly in 1993,<sup>15</sup> makes violence against women an issue of international concern but refrains from categorizing violence against women as a human rights issue in its operative provisions. The failure to create a nexus between violence against women and human rights was due to a fear that this might dilute the traditional notion of human rights. It was said that the idea of human rights abuses

<sup>9</sup> Beijing Platform for Action, UN Doc. A/CONF.177/20 & Add.1, Ann. II, para. 245(b) (1995), reprinted in 33 ILM 401, 457 (1996).

<sup>10</sup> Dianne Otto, *Holding up Half the Sky, But for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women*, 6 AUSTRALIAN FEMINIST L.J. 7, 21 (1996).

<sup>11</sup> E.g., Carol Cohn, *War, Wimps and Women: Talking Gender and Changing War*, in GENDERING WAR TALK 227, 231 (Miriam Cooke & Angela Woollacott eds., 1993).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, Art. 1, 1465 UNTS 85.

<sup>15</sup> GA Res. 48/104 (Feb. 23, 1994), reprinted in 33 ILM 1049 (1994).

required direct state involvement and that extending the concept to cover private behavior would reduce the status of the human rights canon as a whole.<sup>16</sup>

This type of public/private distinction in international human rights law is not a neutral or objective qualification. Its consequences are gendered because in all societies men dominate the public sphere of politics and government and women are associated with the private sphere of home and family. Its effect is to blot out the experiences of many women and to silence their voices in international law.

### *World Traveling*

A second methodological issue for feminists in international law is how to respond to the many differences among women. International law asserts a generality and universality that can appear strikingly incongruous in an international community made up of almost two hundred different nationalities and many more cultural, religious, linguistic and ethnic groups. Thus, the abstract commitments of the Convention on the Elimination of All Forms of Discrimination against Women will be translated in greatly varying circumstances, from political systems that do not allow women to vote, to systems of more subtle discrimination. The occasional nod in the direction of diversity among women in international instruments remains at a very general level; for example, the use of classifications such as "Western women" and "Third World women." These monolithic categories carry a lot of baggage: assumptions of wealth, education, work and progress, on the one hand, and of poverty, oppressive traditions, illiteracy and overpopulation, on the other.<sup>17</sup> In reality, as Chandra Mohanty has pointed out, "[w]omen are constituted as women through the complex interaction between class, culture, religion and other ideological institutions and frameworks. They are not 'women'—a coherent group—solely on the basis of a particular economic system or policy."<sup>18</sup>

Various methods have been proposed for feminist explorations in an international context. For example, Isabelle Gunning has described a technique of "world traveling" that requires "multicultural dialogue and a shared search for areas of overlap, shared concerns and values."<sup>19</sup> Particularly in the discussion of human rights issues in other cultures, Gunning has counseled feminist international lawyers, first, to be clear about their own historical context; second, to understand how the women involved in the human rights situation might see them; and third, to recognize the complexities of the context of the other women.<sup>20</sup> In turn, Rosi Braidotti has argued that feminists should use "multiple literacies" in engaging the global range of feminisms.<sup>21</sup> This technique requires "being able to engage in conversation in a variety of styles, from a variety of disciplinary angles, if possible in different languages."<sup>22</sup> Braidotti has advised feminists in the international arena to "relinquish the dream of a common language" and to accept that we can achieve only "temporary political consensus on specific issues."<sup>23</sup>

Another strategy for feminists working with international issues has been suggested by Mohanty. She has developed the idea of an "imagined community" (first elabo-

<sup>16</sup> See Hilary Charlesworth, *Worlds Apart: Public/Private Distinctions in International Law*, in PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES 243, 256–59 (Margaret Thornton ed., 1995).

<sup>17</sup> See Chandra Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, FEMINIST REV. 61 (1988).

<sup>18</sup> *Id.* at 74.

<sup>19</sup> Isabelle Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 191 (1991–92). See also Karen Engle, *Female Subjects of International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992).

<sup>20</sup> Gunning, *supra* note 19, at 191.

<sup>21</sup> Rosi Braidotti, *The Exile, the Nomad, and the Migrant: Reflections on International Feminism*, 15 WOMEN'S STUD. INT'L F. 7, 9 (1992).

<sup>22</sup> *Id.* at 10.

<sup>23</sup> *Id.*

rated by Benedict Anderson)<sup>24</sup> in the context of problems of writing about Third World feminisms in a general, but worthwhile, way. For Mohanty, the epithet "imagined" is used in contrast to existing boundaries—of nation, color, sexuality, and so on—to indicate the potential for collaborative endeavor across them; the term "community" refers to the possibility of a "horizontal comradeship" across existing hierarchies. An imagined community of feminist interests does not imply homogeneity, a single set of feminist concerns, but rather a strategic, political alliance.<sup>25</sup> Mohanty has written: "it is not color or sex which constructs the ground for these struggles. Rather it is the way we think about race, class, and gender—the political links we choose to make among and between struggles."<sup>26</sup>

How can these various responses to diversity among women in the international community be reflected in international legal analysis? I think that they suggest a number of related moves. First, feminist international lawyers must be aware of the limits of their experience, that is, wary of constructing universal principles on the basis of their own lives. Second, the technique of asking questions and challenging assumptions about international law may be more valuable than generating grand theories of women's oppression. Third, international lawyers must recognize the role of racism and economic exploitation in the position of most of the world's women.<sup>27</sup> They should attend to the "multiple, fluid structures of domination which intersect to locate women differently at particular historical conjunctures"<sup>28</sup> rather than invoke "a notion of universal patriarchy operating in a transhistorical way to subordinate all women."<sup>29</sup> This requires an appreciation of the forms and intersections of systems of oppression. Donna Haraway has wryly observed on the difficulty of this task: "It has seemed very rare for feminist theory to hold race, sex/gender and class analytically together—all the best intentions, hues of authors, and remarks in prefaces notwithstanding."<sup>30</sup>

Some feminists have argued that a more complex understanding of oppression indicates that in some circumstances a purely gendered or women-centered analysis may not be appropriate. Chow has described her response to the question "how should we read what is going on in China in terms of gender?" posed after the Tiananmen Square massacre in 1989, as "We do not, because at the moment of shock Chinese people are degendered and become simply 'Chinese.'"<sup>31</sup> She has argued that using a single analytical category to "read" a political crisis is both inaccurate and presumptuous:

The problem is not how we should read what is going on in China in terms of gender, but rather: what do the events in China tell us about gender as a category, especially as it relates to the so-called Third World? What are gender's limits, where does it work, and where does it not work?<sup>32</sup>

Chow has criticized the notion of "women" used in liberal feminism as "pinned down to the narrowly sexualized aspect of that category, as 'women' versus 'men' only."<sup>33</sup> At the

<sup>24</sup> BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE SPREAD OF NATIONALISM* (1983).

<sup>25</sup> Chandra Mohanty, *Introduction: Cartographies of Struggle*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM*, *supra* note 6, at 1, 4.

<sup>26</sup> *Id.*

<sup>27</sup> See Grosz, *supra* note 2.

<sup>28</sup> Mohanty, *supra* note 25, at 13.

<sup>29</sup> M. Jacqui Alexander & Chandra Mohanty, *Genealogies, Legacies, Movements*, in *FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES* at xiii, xix (M. Jacqui Alexander & Chandra Mohanty eds., 1997).

<sup>30</sup> DONNA HARAWAY, *SIMIANS, CYBORGS AND WOMEN: THE REINVENTION OF NATURE* 129 (1991).

<sup>31</sup> Chow, *supra* note 6, at 82. Compare Zalewski's response to a similar question in Marysia Zalewski, *Well, What Is the Feminist Perspective on Bosnia?* 71 INT'L AFF. 339 (1995).

<sup>32</sup> Chow, *supra* note 6, at 82.

<sup>33</sup> *Id.* at 83.

same time, she has acknowledged that, outside the immediacy of a political crisis, ideas about gender and sexuality can be useful challenges to the authority of traditional schemes of knowledge.<sup>34</sup>

## II. INDIVIDUAL ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES IN INTERNAL CONFLICTS

How might a feminist international lawyer approach the specific question of individual accountability for human rights abuses in armed conflict? There is considerable empirical evidence that women are affected by armed conflict in ways that men are not.<sup>35</sup> The savagery of warfare seems closely linked to a wild form of male sexuality, a type of "toxic testosterone" in Michael Ignatieff's words,<sup>36</sup> and women and girls are the most obvious objects of this violence. Rape has been understood as one of the spoils of the victor, serving also to humiliate the vanquished. Globally, women form only 2 percent of regular army personnel, but as civilians they suffer disproportionately from armed conflict.<sup>37</sup> For example, women and children constitute the majority of the victims in African conflict zones.<sup>38</sup> In northern Uganda, young girls have been abducted to become the "wives" of commanders in the Lord's Resistance Army, which is fighting President Museveni's government forces.<sup>39</sup> In refugee camps, women tend to be responsible for the collection of food, fuel and water, requiring them to venture from the relative safety of the camps and thus to risk rape, torture and death from rebels, government soldiers and land mines.<sup>40</sup> Women's lower social status also disadvantages them in the "relief" operations conducted during and after armed conflict. For example, in Somalia relief agencies often consult "household heads" when making decisions about the distribution of food and medicines, and these are usually regarded as the men.<sup>41</sup> In Uganda women survivors of decades of conflict claim that reproductive health has not been adequately attended to in relief work.<sup>42</sup> Violence against women has been described more generally as "among the most serious and pervasive human rights abuses that the international community [now] confront[s]." <sup>43</sup> Nongovernmental organizations have chronicled, in particular, massive violence against women during armed conflict in Bosnia and Rwanda and the failure of their governments, international donors, humanitarian organizations, and reconstruction and development agencies to respond to women's needs in the "postwar" period.<sup>44</sup>

Whether and how individuals should be held criminally accountable for human rights abuses in internal conflicts has increasingly exercised international lawyers. These questions have been prompted by the fact that the major overt manifestation of tension in the international community has shifted from wars between states to armed conflicts within states. What directions do feminist methodologies suggest for analyzing international law in this area? On one level, the acknowledgment of women's lives and the use of the vocabulary of gender in the statutes of the ad hoc Tribunals for the former Yugoslavia and for Rwanda and the international criminal court (ICC) might suggest that feminist

<sup>34</sup> *Id.* at 88.

<sup>35</sup> See, e.g., Special Rapporteur on Contemporary Forms of Slavery, Final Report on Systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13 (1998).

<sup>36</sup> MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE* 127 (1998).

<sup>37</sup> UNITED NATIONS DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT* 45 (1995).

<sup>38</sup> See International Federation of Women Lawyers (FIDA), Statement, Uganda (Oct. 16, 1998) (on file with author).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> HUMAN RIGHTS WATCH, *WORLD REPORT* 1998, at 391 (1998).

<sup>44</sup> See generally HUMAN RIGHTS WATCH, *supra* note 43.



activism has had a progressive effect on the law. On another level, it appears that even the "new" international criminal law remains primarily a system based on men's lives.

International law has traditionally drawn a distinction between the principles of individual conduct that apply in times of armed conflict (international humanitarian law, IHL) and those that operate in peacetime (human rights law). This dichotomy has led to many anomalies and inconsistencies.<sup>45</sup> From a feminist perspective, the distinction has allowed IHL, with its basis in codes of warriors' honor,<sup>46</sup> to factor out issues that do not relate to the warrior caste.<sup>47</sup> For example, the guardian of IHL, the International Committee of the Red Cross (ICRC), was able to consider the Taliban's exclusion of women from any workplace in Afghanistan as completely outside its mandate. Ignatieff has described the self-imposed constraints of the ICRC in this situation: "Its legitimacy depends on its working with warriors and warlords: if they insist that women be kept out of sight, it has no choice but to go along."<sup>48</sup> The honor of warriors has nothing to say about the oppression of women. Human rights law, while more expansive in its coverage than IHL, has, as indicated above, provided a more limited response to the harms that women generally face compared with those confronting men. International criminal law, the topic of this symposium, is an amalgam of IHL and human rights law. In many ways, it has combined the gendered blind spots of both traditions.

I want to pose questions about three interrelated aspects of the "concrete situation" put to us by the symposium editors. What is the nature of international legal knowledge in this context? What knowledge is privileged and what knowledge is silenced and devalued?<sup>49</sup>

### *Human Rights Abuses*

The category of "human rights abuses" is a contested one from a feminist perspective. Analysis of the understanding of human rights in international law generally has shown that the definition of human rights is limited and androcentric.<sup>50</sup> The limitations of human rights law with respect to women are intensified in the context of IHL. Take, for example, the way that it deals with rape and sexual assault. Article 27 of the Fourth Geneva Convention places states under an obligation to protect women in international armed conflict "against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."<sup>51</sup> The provision assumes that women should be protected from sexual crimes because they implicate a woman's honor, reinforcing the notion of women as men's property, rather than because they constitute violence. This proprietary image is underlined by the use of the language of protection rather than prohibition of the violence.<sup>52</sup> Additional Protocol I replaces the reference to a woman's honor with the notion that women should "be the object of special respect,"<sup>53</sup> implying that women's role in childbearing is the source of special status. Significantly, the provisions on rape are not specifically included in the category of grave breaches of

<sup>45</sup> See generally Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237 (1998).

<sup>46</sup> This term is used by IGNATIEFF, *supra* note 36.

<sup>47</sup> For a feminist analysis of international humanitarian law generally, see Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?* 46 INT'L & COMP. L.Q. 55 (1997).

<sup>48</sup> IGNATIEFF, *supra* note 36, at 146.

<sup>49</sup> Cohn, *supra* note 11, at 231.

<sup>50</sup> See generally, e.g., HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca Cook ed., 1994).

<sup>51</sup> Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 27, 6 USTAT 6, 75 UNTS 287.

<sup>52</sup> Gardam, *supra* note 47, at 73-74.

<sup>53</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Art. 76, 1125 UNTS 3.

international humanitarian law.<sup>54</sup> In the context of noninternational armed conflict, common Article 3 of the Geneva Conventions does not specifically refer to sexual violence, generally prohibiting violence to life and the person, cruel treatment and torture, and humiliating and degrading treatment.

IHL, then, treats rape and sexual assault as an attack on (the warrior's) honor or on the sanctity of motherhood and not explicitly as of the same order as grave breaches such as compelling a prisoner of war to serve in enemy forces. The statutes of the two ad hoc Tribunals and the ICC, by contrast, provide much fuller responses to sexual violence, constructing it, depending on the circumstances, as potentially a crime of genocide, a crime against humanity and a war crime. This recognition was the result of considerable work and lobbying by women's organizations, but its limitations should be noted. In the statutes of the Yugoslav Tribunal and the ICC at least, all three categories of international crimes are concerned only with acts forming part of a widespread, systematic or large-scale attack. Thus, the "new" international criminal law engages sexual violence only when it is an aspect of the destruction of a community.

An example of this characteristic was the invitation to the prosecution by a trial chamber of the Yugoslav Tribunal, when reviewing indictments against Radovan Karadžić and Ratko Mladić, to consider broadening the characterization of the notion of genocide. It stated that "[t]he systematic rape of women . . . is in some cases intended to transmit a new ethnic identity to the child. In other cases humiliation and terror serve to dismember the group."<sup>55</sup> This comment suggests that the primary problem with rape is either its effect on the ethnic identity of the child born as a result of the rape or the demoralizing effect on the group as a whole. This understanding of rape perpetuates a view of women as cultural objects or bodies on which and through which war can be waged. The decision in the 1998 *Akayesu* case by the Rwanda Tribunal that rape constituted an act of genocide if committed with the intention to destroy a particular group<sup>56</sup> also rests on this limited image of women.

The emphasis on the harm to the Tutsi people as a whole is, of course, required by the international definition of genocide, and the *Akayesu* decision on this point<sup>57</sup> simply illustrates the inability of the law to properly name what is at stake: rape is wrong, not because it is a crime of violence against women and a manifestation of male dominance, but because it is an assault on a community defined only by its racial, religious, national or ethnic composition.<sup>58</sup> In this account, the violation of a woman's body is secondary to the humiliation of the group. In this sense, international criminal law incorporates a problematic public/private distinction: it operates in the public realm of the collectivity, leaving the private sphere of the individual untouched. Because the notion of the community implicated here is one defined by the men within it, the distinction has gendered consequences.

Another public/private distinction incorporated (albeit unevenly) in international criminal law—via human rights law—is that between the acts of state and nonstate

<sup>54</sup> Some jurists argue, however, that the prohibition on rape is implicitly included in this category. See, e.g., Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424, 426–27 (1993).

<sup>55</sup> Prosecutor v. Karadžić and Mladić, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Nos. IT-95-5-R61 and IT-95-18-R61, paras. 94–95 (July 11, 1996), reprinted in 108 ILR 85 (1998).

<sup>56</sup> Prosecutor v. Akayesu, Judgement, No. 96-4-T (Sept. 2, 1998) <www.un.org/ict>.

<sup>57</sup> The Rwanda Tribunal also found Akayesu guilty of war crimes and crimes against humanity through his encouragement of individual acts of sexual violence.

<sup>58</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. II, 78 UNTS 277.

actors.<sup>59</sup> Such a dichotomy has gendered aspects when mapped onto the reality of violence against women. Significantly, the ICC statute defines torture more broadly than the Convention against Torture, omitting any reference to the involvement of public officials.<sup>60</sup> Steven Ratner has suggested, however, that some sort of distinction based on "official" involvement is useful as a criterion to sort out those actions against human dignity that should engender state and individual international criminal responsibility and those (such as common assault) that should not.<sup>61</sup> The problem, from a feminist perspective, is not the drawing of public/private, or regulated/nonregulated, distinctions as such, but rather the reinforcement of gender inequality through the use of such distinctions. We need, then, to pay attention to the actual operation of boundary drawing in international law and whether it ends up affecting women's and men's lives differently. For example, the consequence of defining certain rapes as public in international law is to make private rapes seem somehow less serious. The distinction is made, not by reference to women's experiences, but by the implications for the male-dominated public sphere.<sup>62</sup>

A different type of silence that might be identified in the legal protection of the human rights of women in armed conflict is the almost exclusive focus on sexual violence.<sup>63</sup> Insights generated by the "world traveling" method suggest that this emphasis obscures many other human rights issues in times of armed conflict, particularly the protection of economic, social and cultural rights of women. Conflict exacerbates the globally unequal position of women and men in many ways. We know, for example, of the distinctive burdens placed on women through food and medical shortages caused by conflict.<sup>64</sup> When food is scarce, more women than men suffer from malnutrition, often because of cultural norms that require men and boys to eat before women and girls.<sup>65</sup> Humanitarian relief for the victims of conflict regularly fails to reach women, as men are typically given responsibility for its distribution.<sup>66</sup> Economic sanctions imposed before, during or after armed conflict have had particular impact on women and girls, who are disproportionately represented among the poor.<sup>67</sup> Although the effect of these practices falls heavily on women, they are not understood by international law to be human rights abuses that would engage either state or individual responsibility.

### *Internal Conflict*

What interests and voices are privileged or silenced in the distinction between international and noninternational conflicts that is the basis of the "concrete situation" devised by the editors? The Geneva Conventions, Additional Protocol II and the statute of the international criminal court regulate noninternational conflicts in a more circum-

<sup>59</sup> See Ratner, *supra* note 45, at 253.

<sup>60</sup> Rome Statute of the International Criminal Court, July 17, 1998, Art. 7(2)(e), UN Doc. A/CONF.183/9\*, reprinted in 37 ILM 999 (1998) [hereinafter ICC statute]. The statute, however, appears to regard rape and sexual violence as distinct from torture. See Art. 7(1)(g).

<sup>61</sup> Ratner, *supra* note 45, at 254.

<sup>62</sup> Simon Chesterman, *Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INT'L L. 299, 336 (1997).

<sup>63</sup> See Judith Gardam & Hilary Charlesworth, *The Need for New Directions in the Protection of Women in Armed Conflict*, 21 HUM. RTS. Q. (forthcoming Aug. 1999).

<sup>64</sup> See generally Final Report of the Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia, UN Doc. S/25240 (1993).

<sup>65</sup> See United Nations High Commissioner for Refugees, UNHCR Guidelines on the Protection of Refugee Women, UN Doc. E/SCP/67 (1991).

<sup>66</sup> *Id.* at 49.

<sup>67</sup> Sarah Zaidi, *War, Sanctions, and Humanitarian Assistance: The Case of Iraq 1990-1993*, 1 MED. & GLOBAL SURVIVAL 147, 153 (1994). See also Committee on Economic, Social and Cultural Rights, General Comment No. 8, UN Doc. E/C.12/1997/8.

spect way than international conflicts.<sup>68</sup> The explanation for this distinction is that states are reluctant to give international status to those challenging their authority by force, preferring to classify them as criminals subject to domestic jurisdiction. The category of noninternational conflicts regulated by IHL is a very limited one, excluding "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."<sup>69</sup> The international/internal dichotomy has a gendered dimension because it underpins a detailed legal regime protecting combatants in international conflicts, almost invariably men, and a more general regime offering considerably weaker (and more contentious) protection to the civilian population, encompassing almost all women. From the perspective of those caught up in the conflict, the international/internal dichotomy makes little sense, as abuses of human rights do not change character according to this criterion.

On a broader level, the dichotomy between international and internal conflict distracts attention from the close relationship between international practices and internal conflict. For example, Anne Orford has drawn attention to the involvement of international institutions in the creation of "internal" tension.<sup>70</sup> In particular, she has shown how the activities of international economic institutions contributed to the terrible "internal" conflict in the former Yugoslavia and has concluded that "the failure to consider the possibility that the causes of the crisis might be related to the activities of international institutions or the influence of international law has meant that . . . the causes of the conflict [were seen as] 'ethnic' or 'nationalist.'"<sup>71</sup> The distinction, then, is a construct that obscures both the human suffering created by, and the causes of, "internal" conflict.

The distinction between international and internal conflicts has to some extent been de-emphasized in international criminal law through the definition of the categories of genocide and crimes against humanity and through the inclusion of some human rights norms—for example, the prohibition on torture—that operate in times of war and peace.<sup>72</sup> However, the categories of crimes against humanity and war crimes as defined in the ICC statute still assume the existence of some type of hostilities (a "widespread or systematic attack" on civilians in the case of crimes against humanity and the planned large-scale commission of crimes in the case of war crimes).

The notions of conflict and attacks are themselves contingent and controversial. When do they begin and end? For many women, violence is not reduced with the cessation of military hostilities, and ostensible times of peace may be full of conflict for women and produce serious human rights violations. For example, Cynthia Enloe has described the social structures surrounding many foreign military bases where women may be abducted and forced into prostitution or become prostitutes in order to survive.<sup>73</sup> Thus, in Honduras women living on the fringes of United States bases have become caught up in a web of coercive and economic pressures to satisfy the military's expectation of the sexual services of local women.<sup>74</sup> Women's experience of violence and sexual abuse at

<sup>68</sup> See generally Ratner, *supra* note 45.

<sup>69</sup> ICC statute, *supra* note 60, Art. 8(2)(d). In the case of violations of humanitarian law apart from common Article 3 to the Geneva Conventions, the statute adds that its provisions apply only to "armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." *Id.*, Art. 8(2)(f).

<sup>70</sup> Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443 (1997).

<sup>71</sup> *Id.* at 479–80.

<sup>72</sup> However, Article 5 of the Statute of the Yugoslav Tribunal, in Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, annex (1993), reprinted in 32 ILM 1192 (1993), confines crimes against humanity to those committed in international or internal armed conflict.

<sup>73</sup> CYNTHIA ENLOE, *THE MORNING AFTER: SEXUAL POLITICS AT THE END OF THE COLD WAR* 118–20 (1993).

<sup>74</sup> *Id.*

The hands of United Nations peacekeepers in Mozambique, Cambodia and Bosnia<sup>75</sup> is another example of the unreality of the conflict/peace dichotomy: in this context the "peacekeepers" are the source of conflict and violence. Yet another example is the particularly harmful effects on women of economic sanctions imposed as a result of armed conflict.<sup>76</sup> The negotiation of the Dayton Peace Accords shows how the achievement of "peace" may be at the expense of the recognition of, and compensation for, harm suffered by the most vulnerable groups.<sup>77</sup> The failure of the Dayton Accords to acknowledge the treatment of, or provide any assistance to, the Bosnian women who were raped and sexually abused during the conflict has perpetuated their suffering.<sup>78</sup>

### *Individual Accountability*

The notion of "individual" accountability raised by the editors' "concrete situation" implies a contrast with (civil) state responsibility. Individual criminal accountability is regarded by most international lawyers as a higher, and more effective, deterrent to human rights abuses than state responsibility, because of the risk that the responsible state may choose not to impose any punishment on the actual perpetrator.<sup>79</sup> In this sense, it might be argued that at the international level individual accountability for human rights abuses affecting women would be a valuable method to reduce these wrongs. In many countries, the international sphere is regarded as more hospitable to women's claims than national legal systems. What criterion, if any, should be used to distinguish those violations of human rights that generate individual accountability from those that do not? While we may not wish to allocate criminal responsibility for every breach of human rights, it is critical that the principle of accountability not effectively reinforce gendered differences. The criterion of official conduct, discussed above, may well have this effect.

Feminists have had mixed views on the appropriate reaction to crimes against women in national legal systems. Although they have often been skeptical of systems of criminal justice, many feminists have supported strict application of existing law and called for strong penalties in the case of violence against women.<sup>80</sup> At the same time, they have pointed to the need to compensate and support victims of violence.<sup>81</sup> Involvement in criminal legal processes, whether national or international, may bring about further trauma in the person who was the object of violence.<sup>82</sup> Moreover, pursuing individual criminal accountability alone can distract us from investigating the causes of a problem. Focus on individual acts of violence against women may obscure the structural relations of power and domination that make them possible and the continuity between the ways women are treated in "peacetime" and in times of "conflict": rape in armed conflict is

<sup>75</sup> See Anne Orford, *The Politics of Collective Security*, 17 MICH. J. INT'L L. 373 (1996).

<sup>76</sup> See *supra* note 67.

<sup>77</sup> See Ustinia Dolgopoul, *A Feminist Appraisal of the Dayton Peace Accords*, 19 ADELAIDE L. REV. 59 (1997).

<sup>78</sup> *Id.* at 66-68.

<sup>79</sup> E.g., Ratner, *supra* note 45, at 240.

<sup>80</sup> See Susan Edwards, *Violence against women: feminism and the law*, in FEMINIST PERSPECTIVES IN CRIMINOLOGY 145, 146-48 (Loraine Gelsthorpe & Allison Morris eds., 1990).

<sup>81</sup> See Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326, 337 (1994); Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTINGS WOMEN'S L.J. 171 (1994).

<sup>82</sup> For a debate over the appropriate treatment of victims of rape as witnesses before the Yugoslav Tribunal, see Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AJIL 75 (1997); Monroe Leigh, *Witness Anonymity Is Inconsistent with Due Process*, 91 AJIL at 80. See also Kate Fitzgerald, *Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law*, 8 EUR. J. INT'L L. 638 (1997).

made possible by the prevalence of rape in times of peace. Such a focus will not necessarily provide an incentive to remedy human rights abuses that are the product of a systematic failure to create the conditions necessary to guarantee the security of women.<sup>83</sup> International trials of individuals for human rights abuses during armed conflict serve a range of social functions, including retribution, deterrence and absolution through catharsis.<sup>84</sup> The ideal of justice animating them is closely connected, as Simon Chesterman has shown, to a particular understanding of peace and order obtained through military means.<sup>85</sup> The trials allow a return to the "order" of the status quo, but this public order is dependent both on the acceptability of violence and on the domination of women in the private domain.

Schemes of accountability for human rights violations are not confined to criminal responsibility. For example, the "truth commissions" established in a number of states, including Uganda, Chile, El Salvador and South Africa, were designed to establish the facts about patterns of human rights violations, without necessarily leading to individual criminal prosecutions. The rationale of these investigatory mechanisms was that knowledge of the truth would itself promote social healing and reconciliation.<sup>86</sup> The nonadversarial nature of these proceedings might appear to be consistent with some feminist scholars' reservations about criminal proceedings and support for alternative forms of dispute resolution. The experience of the commissions, however, is mixed. Their effectiveness in promoting reconciliation has been dependent on political support and broad terms of reference.<sup>87</sup> Issues of gender have thus far not been seen as relevant to their mandates.

The notion of state responsibility has recently been developed in ways that encompass gendered harm. For example, in *Mejía Egocheaga v. Peru* the Inter-American Commission on Human Rights held Peru accountable for the rape of a woman, Raquel Mejía, by Peruvian security forces as an aspect of the campaign against civilians suspected of having connections with insurgents. The Commission observed that there were no effective remedies within Peru to pursue claims against the security forces. It stated:

Current international law establishes that sexual assault committed by members of security forces, whether as a result of the deliberate practice promoted by the state or as a result of failure by the state to prevent the occurrence of this crime, constitutes a violation of the victim's human rights, especially the right to physical and mental integrity.<sup>88</sup>

The value of this principle is its recognition of international responsibility for an inadequate national structure to respond to crimes against women. When is a national legal system considered deficient in this context? International law appears able to recognize the Peruvian system as inadequate because it allowed no action against the security forces. It is less ready to respond to the significant structural problems in most legal systems, which may offer formal legal remedies for gendered harms but in practice fail to deliver justice to women.<sup>89</sup>

<sup>83</sup> See Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, *supra* note 50, at 85, 85–86.

<sup>84</sup> See Chesterman, *supra* note 62, at 311–17.

<sup>85</sup> *Id.* at 319.

<sup>86</sup> See Priscilla Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 604 (1994).

<sup>87</sup> *Id.* at 635–50.

<sup>88</sup> Case 10.970, Report 5/96 (Mar. 1, 1996), *reprinted in* 1 BUTTERWORTHS HUM. RTS. CASES 229 (1996).

<sup>89</sup> See, e.g., AUSTRALIAN LAW REFORM COMMISSION, *EQUALITY BEFORE THE LAW* (1994).

## III. CONCLUSIONS

How do feminist methods compare to the other methodologies presented in this symposium? In principle, all the methods are capable of some response to the situation of women worldwide and, indeed, feminist international lawyers have drawn on each of these methods, from positivism to critical legal studies, in their attempts to make international law more useful to women. However, unlike these other methods, my account of feminism asserts the importance of gender as an issue in international law: it argues that ideas about "femininity" and "masculinity" are incorporated into international legal rules and structures, silencing women's voices and reinforcing the globally observed domination of women by men. None of the other methodologies represented here displays any concern with gender or, indeed, with the position of women as an international issue. The situation of over half the world's population is not seen as relevant to attempts to define universally applicable principles.

Another distinction between feminist methods and many of the other contributions is in the way they view the idea of objectivity in international law. For example, Bruno Simma and Andreas Paulus, writing for the enlightened positivists, emphasize the need for the international lawyer to put aside his or her subjective preferences and to strive for impartiality. They insist that the very "professional ethics of a lawyer requires the impartial mediation of attitudes, ideologies or conflicts."<sup>90</sup> Mary Ellen O'Connell's account of international legal process and Jeffrey Dunoff and Joel Trachtman's statement of the law and economics approach similarly stress the centrality of objectivity to the international legal system. Feminist methods question the possibility of objectivity in a system that effectively excludes women's voices. They are skeptical about the construction of the neutral and impartial standards, seeing them as synonyms for male perspectives. Skepticism about the hunt for the objective is, of course, shared by many critical thinkers, but they have remained curiously aloof from examining the implications for gender politics, or indeed for the situation of other marginalized groups. Like Martti Koskeniemi, feminists pay attention to the binary structures of international law, but they argue that these structures also have a gendered dimension, reflecting and solidifying systems of subordination based on sex.

Some feminist methods overlap with those described in other contributions. For example, the New Haven approach described by Siegfried Wiessner and Andrew Willard gives prominence to the clarification of the observer's standpoint, at first sight similar to the feminist concern with the politics of identity. However, from a feminist perspective, the New Haven School is interested in only a very narrow understanding of standpoint, failing to attribute any significance to the sex of the observer and the gendered world of international law. If law is a "human artifact," is it not relevant that its makers are almost invariably men? The New Haven commitment to a world public order of human dignity also fails to consider the gendered dimensions of the notions of order and human dignity. What are the underpinnings of the order promoted and what model of humanity is being relied on? Another set of methods that have had some resonance for feminist international lawyers are those of international relations. It is striking that none of the literature discussing the potential bridges between international law and international relations, including Kenneth Abbott's contribution to this symposium, has paid any attention to the significant influence of the rich feminist IR literature on international

<sup>90</sup> Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AJIL 302, 316 (1999).

legal scholars, and vice versa. The lack of interest in this connection underlines how eccentric and marginal feminists appear in the two disciplines.<sup>91</sup>

The editors of this symposium asked us to consider how "our" method's analysis of international law would assist a decision maker in appraising the lawfulness of conduct and constructing law-based options for the future. The feminist methods that I have outlined indicate the need for a radical shift in perspective in international law. My version of a feminist analysis suggests that international law rules on accountability for human rights abuses in internal conflicts tend to privilege a certain set of experiences and filter out many issues that touch women's lives in particular. Is there any point in changing the law? Some feminist theorists might dismiss reform of the law as a worthwhile strategy, arguing that this may give undue prominence to law as a site of social change. They may point out that some women will gain more from international law than others. In any event, it may be argued, even if we get the principles right, there is no guarantee that the practice will change. Feminists might point to the greater value of political campaigns or media coverage in reducing the oppression of women.<sup>92</sup> These arguments, while powerful, do not acknowledge that international law has a symbolic, as well as a regulative, function. Claims based on international law can carry an emotional and moral legitimacy that can have considerable political force.<sup>93</sup>

Is the reconception of international law for which I have argued a practical and efficacious strategy? In a review of a collection of papers on feminism in international law,<sup>94</sup> Koskenniemi has cautioned against the enthusiasm for radical change in our discipline:

We can reconceive international law every now and then, but not all the time. Our immediate fears and hopes do not necessarily match to produce the good society . . . . At some point, we need distance from those fears and hopes—if not objective distance, then at least a partial, consensual, formal distance. That law makes this distance possible (if always only for a moment) is not a defect of law, but its most immediate benefit.<sup>95</sup>

Koskenniemi seems to be advocating acceptance of the framework of international law because, flawed as it is, it is some protection from untrammelled subjectivity and politics. My argument here, by contrast, is that international law does not provide even a "partial, consensual, formal distance" from subjectivity. It is intertwined with a gendered subjectivity and reinforces a system of male symbols.

Feminist methods help us understand women's subordination in ways that are much deeper than those offered by the legal concept of discrimination. How can the two goals of feminism, activism and theorizing, come together in the context of accountability for human rights violations in internal armed conflict? Ensuring equal participation of women in the institutions of international criminal law is an important first step.<sup>96</sup> But this alone will not ensure a change of perspective. As Cohn has pointed out:

[I]t is not simply the presence of women that would make a difference. Instead, it is the commitment and ability to develop, explore, rethink and revalue those ways of

<sup>91</sup> See Tickner, *supra* note 1.

<sup>92</sup> E.g., CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989).

<sup>93</sup> See Richard Bilder, *Rethinking Human Rights Law: Some Basic Questions*, 1969 WIS. L. REV. 171.

<sup>94</sup> RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda Dallmeyer ed., 1993).

<sup>95</sup> Martti Koskenniemi, Book Review, 89 AJIL 227, 230 (1995).

<sup>96</sup> In a significant move, the ICC statute, *supra* note 60, Art. 36(8)(a)(iii), calls on states parties to take into account the need for "[a] fair representation of female and male judges." It also requires states parties to consider the inclusion of judges with legal expertise in violence against women. *Id.*, Art. 36(8)(b).



thinking that get silenced and devalued that would make a difference. For that to happen, men, too, would have to be central participants.<sup>97</sup>

International lawyers require a much richer understanding of gender than the definition provided in the ICC statute, which elides the notion of gender and sex.<sup>98</sup> It does not recognize that gender is a constructed and contingent set of assumptions about female and male roles and that many of the defining dichotomies of international criminal law, such as order/disorder, public/private, international/internal, have a gendered dimension. They should appreciate the way that notions of femininity and masculinity are used in conflict and how such constructions validate "normal" roles for women and men. Rape and sexual assault should be analyzed in international law as crimes against women, rather than offenses against their communities. International legal recognition of persecution based on gender as a crime against humanity offers the possibility of challenging the narrow conception of the social order protected by international criminal law.<sup>99</sup> Most fundamentally, international lawyers need to understand the way that our discipline has legitimated the use of violence by accepting it as an inevitable aspect of international relations and the implications that this has for our daily lives.

HILARY CHARLESWORTH\*

## THE LAW AND ECONOMICS OF HUMANITARIAN LAW VIOLATIONS IN INTERNAL CONFLICT

### INTRODUCTION

The problem of criminal responsibility for human rights atrocities committed in internal conflict provides an appropriate vehicle for examining various theoretical and methodological approaches to international law. The issues raised include the following: Does international law provide for individual criminal responsibility for such acts? How best can these atrocities be prevented? Should international law address these matters or are they better left to domestic law? Why does international legal doctrine distinguish between human rights violations committed in international conflict and the identical acts committed in internal conflict?

International lawmakers, judges, practitioners and scholars have had trouble answering questions like these because of a shortage of useful theory. Law and economics (L&E) is rich in useful theory: it has constructed and refined a body of rationalist theory that can generate refutable hypotheses, and it suggests methodologies by which those hypotheses may be tested. While law and economics is rich in theory, it exalts empiricism (in which it is surprisingly poor). In fact, we are critical of a law and economics that has immodestly been willing to prescribe solely on the basis of theory. In this necessarily brief essay, we do not reach positive conclusions or normative prescriptions because our

<sup>97</sup> Cohn, *supra* note 11, at 239.

<sup>98</sup> ICC statute, *supra* note 60, Art. 7(3).

<sup>99</sup> *Id.*, Art. 7(1). See Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 261-64 (1994).

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theoretical and methodological approach does not permit conclusions prior to empirical testing. We are only able to indicate the types of areas that law and economics theory would suggest evaluating, and to describe how law and economics has addressed some related or similar topics. In addition, we show how L&E can assist international lawyers in perhaps their most important creative role—the design and operation of international institutions that permit states to overcome transaction costs and strategic problems and thus to cooperate to realize joint gains.<sup>1</sup>

This essay proceeds as follows. First we very briefly describe what we mean by a “law and economics” approach to international legal issues and outline several L&E methodologies that can be usefully applied to international legal issues.<sup>2</sup> In part II, we turn from description to application and demonstrate how various L&E approaches can illuminate some of the issues raised by the question of international criminalization of abuses committed in internal conflict. Our discussion will focus on (1) the distinction between human rights abuses committed in internal and international armed conflict, and (2) the allocation of jurisdiction between domestic and international courts. Finally, in part III, we address several methodological questions posed by the organizers of this symposium, examine some of the broader implications of the economic analysis of international law, and comment on several of the approaches described by other contributors to this symposium.

# I. THE ECONOMIC ANALYSIS OF INTERNATIONAL LAW

Economics is the study of rational choice under conditions of limited resources. Rational choice assumes that individual actors seek to maximize their preferences. The goal of L&E analysis is to identify the legal implications of this maximizing behavior, both in and out of markets, and for markets and other institutions. While the first generation of L&E scholarship often employed cost-benefit analysis to address these issues, our focus is not just on cost-benefit analysis, but also on transaction cost analysis and game theory, and the application of these methodologies to political contexts through public choice theory.

In many respects these techniques formalize, extend and contextualize insights that are familiar to most international lawyers. But this formalization is important—it allows us to focus on relevant variables, generate hypotheses, and, to some extent, empirically test these hypotheses. Furthermore, it provides a firmer and less subjective basis for argumentation than traditional international law analysis. It is less subjective insofar as it eschews simple natural law or epithet-based argumentation, and provides the capacity to render transparent the distributive consequences of legal rules. Perhaps most important to scholars, it furnishes a basis for a progressive research program built on shared foundations, one that will seek to answer research questions and move on, rather than endlessly address the same tired questions.

Each of the techniques described below has spawned a vast literature. For present purposes, a thumbnail description must suffice. Readers already familiar with these techniques will correctly understand that the descriptions below are caricatures and that, in practice, there is substantial overlap among these techniques.

<sup>1</sup> For similar perspectives, see ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996); Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AJIL 367 (1998).

<sup>2</sup> Elsewhere, we have attempted to show how L&E approaches can inform our understanding of, inter alia, treaty law, the exercise of prescriptive jurisdiction, and the competences of international organizations. For a more comprehensive review of the utility of law and economics in international legal analysis, with references to additional literature, see Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999).

*Price theory* is the basic tool of neoclassical economics. Based on the assumption that actors pursue rational strategies to maximize their subjective preferences, price theory evaluates their interactions. Often it mathematically analyzes whether supply and demand will be in stable equilibrium and then evaluates the Pareto efficiency of the equilibrium. Pareto efficiency analysis simply asks whether there is another equilibrium that would make at least one person better off (in his or her own perception) without making anyone else worse off. L&E often asks the next question: can one person be made so much better off that he or she will have sufficient surplus to compensate those made worse off? The latter analysis is known as potential Pareto efficiency analysis, or Kaldor-Hicks efficiency, and, importantly, equates to cost-benefit analysis.<sup>3</sup> Economists have developed tools that permit the use of price theory even in contexts where monetized markets do not exist.<sup>4</sup>

The field of *transaction cost economics* grows out of Coase's insight that if people could contract with one another costlessly, they would always reach a Pareto efficient outcome without government (or other outside) intervention. This insight has incorrectly been taken to mean that government should never intervene; in fact, as transaction costs are always present, neither the market nor government is presumptively efficient. Transaction cost economics refines price theory by including consideration of, for example, the cost of identifying potential transactors, negotiating agreement and enforcing agreement. For a variety of reasons, including the number of interested parties, these transaction costs are frequently high in the international context, and opportunities for joint gain through contracting may therefore not be realized. For example, even if states would benefit from the establishment of a clear rule of individual responsibility for atrocities in internal conflict, the "transaction costs" involved in the negotiation of a treaty to do so may preclude such an agreement.

*Game theory* is the analysis of strategic interactions—the choices that actors make when they realize that outcomes depend, in part, on decisions made by others. Thus, game-theoretic analysis can help illuminate the strategic environment that a state confronts when, for example, its decision on whether or not to surrender a suspect to an international criminal court turns on the likelihood that other states will similarly surrender suspects. Game theory is an important source of counterintuitive insight insofar as it shows how parties might predictably fail to act together to increase joint gain.

*Public choice* applies economic tools to decision making outside of markets.<sup>5</sup> In particular, it focuses on political processes, treating the lawmaking process as a microeconomic system and laws as goods supplied to the highest bidders. Public choice suggests that, owing to informational and organizational costs, small, concentrated interest groups with high individual stakes in an issue will tend to be more successful in mobilizing resources—and hence in influencing legislation—than large groups with equal aggregate interests. Public choice can be used to analyze treaties, as well as the creation and interaction of international institutions.

Finally, much of L&E analysis is premised upon the distinction between positive and normative economics. Positive economics is that part of the discipline that, self-consciously modeling itself on the natural sciences, focuses on describing and explaining the world around us. Positive analysis in law, for example, would seek simply to describe the

<sup>3</sup> Notably, potential Pareto efficiency analysis lacks some of the liberality of Pareto efficiency analysis, insofar as it does not let the person made worse off decide for himself whether he has been adequately compensated.

<sup>4</sup> For example, contingent valuation theory uses survey, rather than market, data to determine how much individuals would pay for various nonmarket goods. See, e.g., *CONTINGENT VALUATION: A CRITICAL ASSESSMENT* (Jerry A. Hausman ed., 1993).

<sup>5</sup> For an accessible introduction to the various strands of public choice theory, see David A. Skeel, Jr., *Public Choice and the Future of Public-Choice Influenced Legal Scholarship*, 50 VAND. L. REV. 647 (1997).

effects of particular legal rules.<sup>6</sup> Thus, the positive analyst may as a professional decline to judge whether international law *should* hold individuals criminally liable for human rights atrocities committed in internal conflict: the positive analyst will not take a position on the *lex ferenda*. However, given a legal and policy decision that individual criminal responsibility should attach to such behavior, the positive analyst can provide information about the consequences that may be expected to follow from such a rule.

Normative economics, which many economists reject, *evaluates*—rather than simply describes—behavior, and advances reform proposals.<sup>7</sup> Normative economic analysis typically offers reforms designed to maximize “social welfare,” usually measured by people’s revealed preferences (without suggesting what those preferences should be). It is in this sense that it engages *lex ferenda*.

We recognize that the distinction between “positive” and “normative” economics is problematic; positive description is often implicitly normative to the extent that it identifies a mismatch between articulated goals and policy or institutional choices. Moreover, even when L&E analysis purports to be positive, it is not neutral. Rather, it is premised upon a normatively determined approach termed “methodological individualism.” Under this approach, no particular outcome or norm is *a priori* deemed desirable; rather, individual choice, sometimes called “consumer sovereignty,” is the ultimate source of values.<sup>8</sup> The assumption that individuals are the ultimate source of norms sharply distinguishes L&E analysis from other approaches to international law, such as natural law theories.

When extended to the international realm, the commitment to methodological individualism has substantial normative implications. For example, given the emphasis on individual choice, L&E methods will tend to favor more, rather than less, representative institutions.<sup>9</sup> Moreover, methodological individualism views the state not as a player in its own right with its own normative value, but as a mediating institution with only derivative normative value.<sup>10</sup> Thus, while L&E rejects state-centered positivism, it would rehabilitate the state as an institution, just as it would validate the corporation as an institution: as a vehicle for individuals to work together more productively. Finally, the L&E approach is consistent with the legal positivism that respects the law as written because—and to the extent that—it is the product of legislative processes that reflect individual preferences better than the alternative preference-revealing mechanisms.

We hasten to note that our approach emphasizes a particular strand of L&E analysis. Our approach follows the “new institutional economics”—which blends all of the techniques mentioned above—and focuses on comparative institutional analysis.<sup>11</sup> In a world of imperfect institutions, it requires that any proposed institution (*viz.*, any rule or

<sup>6</sup> This is distinct from legal positivism, which focuses on the law as written, rather than some natural law construct regarding how the law should be.

<sup>7</sup> See Avery Wiener Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229, 2239 (1996).

<sup>8</sup> We recognize that this premise—that individuals’ preferences should be given weight—is itself normative. See, e.g., Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 6 (1994).

<sup>9</sup> This can cut in several directions, depending on the issue under consideration. When the institution is a market, L&E understands the market as a mechanism for preference revelation, and often argues against government-imposed barriers to trade. When the institution is legislative in nature, the analysis will tend to argue for more participatory processes, so as to facilitate preference revelation. See, e.g., Gordon Tullock, *Public Choice*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 1040, 1043 (John Eatwell et al. eds., 1987).

<sup>10</sup> This is one way that L&E differs from international law positivism (as well as political science realism). However, as we have argued elsewhere, these perspectives are neither positivist in the economic sense (as they are not grounded in empiricism) nor truly realistic in a descriptive sense. Dunoff & Trachtman, *supra* note 2, at 9–12.

<sup>11</sup> See, e.g., NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994); Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT’L L. & BUS. 470, 535–38 (1997).

organization) be compared with others to understand which provides the greatest social benefits. While lawyers have long engaged in comparative institutional analysis, this comparative method requires analysis of costs and benefits, including transaction costs, as well as the costs and benefits determined by a strategic (game-theoretic) analysis. Below, we apply these methodologies to specific issues raised by the question of individual accountability for human rights abuses in internal conflicts.

## II. ECONOMIC ANALYSIS OF INDIVIDUAL ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES

In this section, we review some potential applications of price theory, transaction cost economics and game theory to the problem of individual accountability for human rights abuses. However, as mentioned above, in practice, these methodologies are not severable from one another but are best viewed as an accretion: transaction cost economics and game theory add sophistication and stronger analytical power to standard price theory alone.

### *Individual Criminal Responsibility for Human Rights Violations in Internal Conflict*

There is substantial dispute regarding the meaning of relevant international law regarding prescription and enforcement of rules against human rights violations in internal conflict. Two critical issues are the following:

(1) Neither Article 3 common to the Geneva Conventions (common Article 3) nor the 1977 Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) contains provisions specifically either (i) requiring states or other parties to such conflicts to punish serious violations, or (ii) imposing criminal responsibility on individuals for violations of these provisions.

(2) Common Article 3 applies to "armed conflict not of an international character," while Protocol II applies to noninternational armed conflict with exceptions for "situations of internal disturbances and tensions . . . as not being armed conflicts." The latter is a restrictive definition setting a high threshold of armed conflict and insurgent organization; moreover, there is no mechanism for authoritative interpretation of these threshold terms. This leaves wide latitude for states to auto-interpret these terms, and to find that the constraints of these provisions do not apply.

L&E would seem at first to have little to say about the *lex lata*—what the law is. After all, an economist would see the determination of the law as a trivial matter: lawyers simply look it up. However, the determination of the law is neither trivial nor mechanical because it is not simply a matter of finding the law but—as critical legal theorists and American legal realists have long recognized—inevitably involves an element of *making* the law. Societies allocate a measure of flexibility to authoritative interpreters—often courts—overtly or covertly to legislate, under cover of interpretation, construction or otherwise.<sup>12</sup>

Richard Posner famously claimed (positively) that common law courts seek economic efficiency in their decisions,<sup>13</sup> and many L&E advocates claim (normatively) that this is what they should do. We disagree with the latter claim (and take no position regarding the former). No individual can determine "efficiency" for another, if efficiency is defined as maximization of preferences, because no individual knows another's preferences. Rather, societies structure legislatures, courts and markets to enable constituents to

<sup>12</sup> See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1997). For a study of how this flexibility is used in an international law context, with references to L&E literature regarding the use by legislators of rules and standards, see Joel P. Trachtman, *The Law and Economics of WTO Dispute Resolution*, 40 *HEFF. INT'L L.J.* (forthcoming 1999).

<sup>13</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 251–61 (4th ed. 1992).

maximize their subjectively determined preferences, subject to institutional constraints. There is no reason to expect that any of these institutions could, a priori, identify and aggregate these preferences in the abstract.<sup>14</sup>

Rather, we believe that L&E's first impulse should be for text-based interpretation, even ahead of a purported efficiency-based interpretation. Text-based interpretation preserves the bargain actually struck by the parties to the treaty and—when the “markets” for treaty-effected transactions are well functioning—such bargains are presumptively efficient. Such a “market-based” (considering the interaction of states to enter into treaties a market) determination of preferences is likely to be more highly respected than a court's third-party interpretation. Furthermore, respect for text promotes additional transactions: if authoritative interpreters respect the original texts, states will be encouraged to enter into treaties. This includes respect for loopholes and gaps in enforcement left in the text. Thus, L&E would argue that the vagueness of Protocol II is just what the parties intended, and should not be “fixed” by interpretation. L&E would further argue that if the parties specifically denied individual responsibility for violations of common Article 3 and Protocol II, this rejection should be respected.

There are difficulties with this argument. One, mentioned above, is that interpreting texts is inevitably a creative, not mechanical, exercise. More important, this argument presupposes that the bargains reached through interstate transactions accurately reflect underlying preferences. But L&E also identifies many situations in which “market failure” occurs and bargains do not necessarily maximize preferences. For example, public choice theory suggests that treaties may advance the interests of the political elites that negotiate the treaties, rather than the broader interests of the constituents they purportedly represent.<sup>15</sup> Other L&E methods identify a variety of other factors—including transaction costs, externalities, imperfect information, coordination difficulties and strategic behavior—that cause states to fail to conclude mutually beneficial bargains. Thus, much of L&E analysis is devoted both to exploring whether, in any particular factual context, the “market” for international transactions is well functioning—and therefore producing presumptively efficient outcomes—and to proposing ways to improve imperfect markets.

Like the other contributors to this symposium, we have strong individual feelings regarding the criminalization of atrocities committed in internal conflicts. However, we do not believe that scholars should be so bold as to seek to substitute their personal views for those of the duly constituted governments of the world and their constituents. Thus, L&E analysis would not join Bruno Simma and Andreas Paulus in searching for interpretive strategies to “overcome” any “gaps” in the law. In this sense, L&E is, ironically, more positivist than the positivists.

### *Preventing Human Rights Violations in Internal Conflict*

*Determining optimal rules, enforcement and penalties.* In the context of the humanitarian law of internal conflict, the first complex question asks what the proscription should be,

<sup>14</sup> According to the fundamental theorem of welfare economics, a perfect (transaction cost free) market would result in “efficient” allocations: maximization of each participant's preferences. There is no perfect market (just as there is no perfect government). According to the theory of the second best, given that a market is imperfect in any dimension, there is no reason to believe that striving toward perfection at other dimensions would result in “more” efficient outcomes.

<sup>15</sup> On the domestic level, L&E scholars have taken widely divergent positions regarding the implications of the “public choice” model of legislation for the judicial construction of statutes. See, e.g., Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986); Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

whom it should apply, by whom it should be enforced, and what the penalties should be. It is necessary to break down this question into its component parts, but to recognize that these components form a complex structure that must be analyzed as a whole to determine the disincentives to violating the proscription. Assuming for a moment a prior legislative specification of the substantive prohibitions, a subsequent question asks how we can induce individuals to comply with these rules.

Price theory assumes that each individual engages in a rational cost-benefit analysis, and suggests that it is necessary to make the price of noncompliance high enough to exceed the perceived benefits from noncompliance. Fines, imprisonment, death penalties, reputational sanctions and lustration—all may be analyzed as prices of behavior.<sup>16</sup> A law and economics analyst would examine prior behavior under various sanctions to determine the level of compliance that a particular sanction would achieve, taking into account the level of enforcement. In many respects, this approach simply formalizes—and thereby disciplines—a commonsensical insight. It allows us to analyze circumstances in which legal proscriptions are legislated without an effective enforcement system, and to recognize that positive law rules without positive law enforcement mechanisms may have little effect on behavior.

Price theory asks whether an enforceable legal rule regarding human rights in internal conflict, perhaps through individual accountability, would generate greater benefits than costs, or more accurately, which rule would generate the maximum net benefits. This analysis cannot proceed in the abstract, for answers to questions like these are necessarily highly context-sensitive. Different individuals, and different societies, respond differently to different types of sanctions. In a closely knit society where reputation is important, reputational sanctions might have a stronger effect—impose a higher “price”—than in a society characterized by rugged individualism.<sup>17</sup> Similarly, the perceived benefits of final victory (including those to both past and future generations) in a centuries-old ethnic conflict must be understood and weighed. At the individual level, a poor person might not respond to fines, because he has no assets with which to pay them. On the other hand, we must weigh the costs of accountability, not only in terms of enforcement and administration costs, but perhaps more significantly in terms of the possibility that accountability will prolong conflict.<sup>18</sup> A sanction that “works” in one society might not work in another. Thus, very importantly, even given identical preferences, what is efficient in one context may not be efficient in another. This insight raises important questions about the utility of international harmonization of humanitarian law.

Discussion of the costs and benefits of criminalizing human rights abuses highlights some of the limitations of price theory. For example, it presupposes that rules, such as those that criminalize human rights abuses committed in internal conflicts, are justified to the extent they accurately reflect aggregate preferences. But this standpoint may not fully capture the purposes served by international humanitarian

<sup>16</sup> Of course, the “price” imposed by any legal sanction must be discounted by reference to its enforceability and the perception of its enforceability: the chances of being caught, the chances of being adjudicated liable or guilty, and the chances of actually being punished. As a general matter, this discount rate is much higher in the international legal system than in domestic systems because there is no mandatory adjudicative jurisdiction and no executive generally able to impose a sanction.

<sup>17</sup> See ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Ellickson’s depiction of the autonomous customary restraints that arise among cattle ranchers in Shasta County is evocative of the development of international law.

<sup>18</sup> For an insider’s account of the conflicting demands of accountability and peace in the Bosnian conflicts, see MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG*, ch. 3 (1997). For a treatment of this issue that invokes the rhetoric of cost-benefit analysis, see ANTHONY D’AMATO, *Peace vs. Accountability in Bosnia*, 88 AJIL 500 (1994).

law. We readily concede that law, and particularly international humanitarian law, often serves a more complex function.<sup>19</sup> Indeed, we might better understand recent doctrinal developments in international humanitarian law more as an effort to influence and shape preferences than as an effort to reflect them.<sup>20</sup> Perhaps the international community criminalizes certain behavior not only to make it more costly, but also to express social disapproval of the behavior and to inculcate abhorrence of it in potential offenders and society at large.<sup>21</sup> Thus, law can shape the preferences of both potential offenders and the larger community.

The focus on costs and benefits may be problematic for other reasons as well. First, while the conventional L&E analysis assumes that potential offenders will be deterred from criminal acts if the expected costs exceed the expected benefits,<sup>22</sup> empirical evidence sheds substantial doubt on the claim that potential offenders accurately compute the costs and benefits of crime.<sup>23</sup> Second, public choice analysis suggests that the costs and benefits to individuals is not the correct positive question in an international legal context. Rather, to describe or predict international legal or political action accurately, we must calculate the costs and benefits to political decision makers, which may differ from the costs and benefits to their constituents.

Finally, some might argue that the value of human rights, by their very nature, cannot be weighed against the value of other policies or goals. This is an argument of incommensurability, or exclusion from economic analysis.<sup>24</sup> However, acceptance of the inability of economic analysis to address these issues would sharply and artificially curtail the domain of economic analysis. Moreover, at least as a descriptive matter, this argument seems overbroad. For example, the laws of war have consistently provided for the payment of compensation or reparations for certain violations,<sup>25</sup> and the International Criminal Tribunal for the former Yugoslavia (ICTY) has acknowledged that the very definition of at least some international human rights includes the recognition that they can be trumped by overriding policy concerns in certain circumstances.<sup>26</sup>

Yet another strand of L&E analysis supports the imposition of criminal responsibility for violations of international humanitarian law. We can understand the protections of international humanitarian law as creating a form of entitlement, and a broad L&E

<sup>19</sup> For an interesting discussion of the purposes served by criminal trials for violations of international humanitarian law, see Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031 (1998).

<sup>20</sup> Similar arguments apply to recent institutional developments. Creation of, for example, the ICTY may have had more to do with pushing the parties toward a peace agreement than with deterring violations of humanitarian law. See W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175, 181 (1995).

<sup>21</sup> See, e.g., Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 615 (1998) (members of the public expect punishment not just to protect them from crime but also to express their moral condemnation of it).

<sup>22</sup> See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985).

<sup>23</sup> See, e.g., A. MITCHELL POLINSKY & STEVEN SHAVELL, ON THE DISUTILITY AND DISCOUNTING OF IMPRISONMENT AND THE THEORY OF DETERRENCE (Harvard Law School, John M. Olin Center of Law, Economics, and Business, Discussion Paper No. 213, 1997).

<sup>24</sup> We address the incommensurability issue in more detail in Dunoff & Trachtman, *supra* note 2, at 48–49.

<sup>25</sup> See, e.g., Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 37–38 (1995). We recognize that these provisions typically apply to international, rather than internal, conflicts but believe this is not germane to the incommensurability argument.

<sup>26</sup> Prosecutor v. Tadić, Protective Measures for Victims and Witnesses, No. IT-94–1–T, at 28 (Aug. 10, 1995), *reprinted in* 105 ILR 599 (permitting witnesses to testify anonymously against defendant). For examples of derogation provisions permitting restrictions of international human rights in certain contexts, see International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 4, 999 UNTS 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Art. 15, 213 UNTS 221; and American Convention on Human Rights, Nov. 22, 1969, Art. 27, 1144 UNTS 123.



Literature explores different ways to protect different types of entitlements.<sup>27</sup> Typically, entitlements are protected through property rules—where the entitlements can be sold, but only through a voluntary transaction at a mutually agreed price—or through liability rules—where a buyer can “take” an entitlement in an involuntary transaction (say, a car accident), but must then compensate the owner at a rate determined by the state.<sup>28</sup> Moreover, entitlements are “inalienable.” In these cases, the law restricts the transferability of an entitlement, for example, the right to vote.

Many of the most fundamental human rights norms, including many of those protected by international humanitarian law, are nonderogable—that is, even if citizens or states wish to “contract out” of these norms, they are not free to do so. Nonderogability suggests that criminal sanctions are appropriate in this context. Property remedies presuppose the ability to transfer the entitlement voluntarily, and liability remedies create, in effect, an option to take the entitlement nonconsensually in exchange for payment. But both of these remedies are inconsistent with the nature of inalienable or nonderogable rights, which can be neither sold nor bought. An additional problem is the impossibility of making restitution in cases of, for example, torture or rape. In contrast, the imposition of criminal responsibility for violations fully respects the inalienable character of the underlying entitlements.

*International versus domestic rules, enforcement and penalties.* In addition to analyzing available rules and penalties, L&E explores the optimal level of application of the rules at between the national and international levels, and the optimal degree of variability of rules among states. For example, it may be better to set broad goals for governments to achieve, rather than to specify in detail how the goals are to be achieved. Moreover, from the perspective of new institutional economics, the question of different institutional competences is central to the analysis. We assume that most of the existing institutional structure is fixed, and seek the best existing (or new) institution to achieve the social goal. Thus, L&E would consider both national and international legal mechanisms for constraining individual conduct.

Assuming a decision is made to impose international law responsibilities on states, we might ask how states may be induced to comply with specified rules. The international system could impose prices on states, as domestic law imposes prices on individuals. It would then be up to the state to ensure that its agents (and perhaps other individuals under its jurisdiction) complied. As noted above, public choice analysis teaches that the individuals who make decisions on behalf of the state may not bear the full cost—in political or other terms—of penalties imposed on the state itself.<sup>29</sup> Therefore, they may lack incentives to direct compliance by the state. As an alternative, the international system could prescribe the precise types of enforcement measures and penalties that the state must impose on individuals. Even then, without control of the institutions that apply these domestic measures, the international legal rules may not cause compliance.

In the present context, of course, the further problem is that internal conflict often threatens the very life of the government, if not the state. Such conflict may therefore be

<sup>27</sup> The seminal work here is Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Ironically, this article was prompted by Calabresi's belief that conceiving of the criminal law as a pricing mechanism was “silly.” Guido Calabresi, *The Simple Virtues of the Cathedral*, 106 YALE L.J. 2201, 2203 (1997).

<sup>28</sup> L&E scholars often claim that liability rules are most appropriate in situations of high transaction costs (such as when the parties cannot easily find and bargain with each other), and that property rules are most appropriate where the parties themselves can easily bargain with each other. See Calabresi & Melamed, *supra* note 27, at 1108–10. This claim has been subject to sustained challenge. See, e.g., Dunoff & Trachtman, *supra* note 2, at 25 & n.89.

<sup>29</sup> The Iraqi leadership's decision to suffer economic sanctions in lieu of arms inspections dramatically illustrates this point.

even more bitter than international conflict. The state's own law would seem to provide insufficient commitment to guarantee compliance. In this regard, international law and legal institutions might be viewed as a mechanism by which states may bind themselves in ways that they otherwise could not, but that are desirable to both the states and their citizens.<sup>30</sup> However, we might then ask what level of international legal sanctions will cause the state to comply with norms that increase its risk of destruction. We suspect that the humanitarian law of internal conflict, when applied to states alone, suffers from noncompliance because of this phenomenon: in crises the price to the state of noncompliance is always likely to be insufficient to induce compliance. This is an important argument for individual responsibility.

### *Distinguishing between Identical Acts in Internal Conflict and International Conflict*

For the reasons identified above, states may be reluctant to agree in advance to enhanced individual responsibility for human rights violations in *internal* conflict. But states have agreed to stronger individual responsibility in connection with *international* conflict. What can explain this apparent "schizophrenia" of distinguishing between the identical acts committed in internal and international conflict?<sup>31</sup>

As noted above, international law results, in the first instance, from bargains among states. In negotiating rules regarding international conflicts, the various parties to the Geneva Conventions each had something to give in direct exchange: narrowly reciprocal *ex ante* agreement to protect combatants and, in certain cases, noncombatants. This reciprocity continues *ex post* when states have the power, if not the legal authority, to withdraw protections in tit-for-tat response to their opponent's breaches. In the context of internal armed conflict, no rebels were at the negotiating table and, although common Article 3 and Protocol II purport to bind insurgents, none gave their consent. Therefore, it may be difficult for rebels credibly to commit themselves to paying the reciprocal price of state commitments to respect human rights in internal armed conflict, and L&E would predict that states generally would not enter into such commitments. This is one reason why the threshold for application of Protocol II under Article 1(1) is so high, requiring "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [a contracting party's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."<sup>32</sup> These provisions release states from any commitment where the insurgent forces are unable to reciprocate. But, as indicated above, generalizations like this must be placed in context. In an era when internal conflicts greatly outnumber international armed conflicts, rebel forces have access to increasingly powerful means of destruction, and killing in internal conflicts is increasingly indiscriminate, other reasons to impose restraint may tip the balance. Careful attention to the negotiating history of, for example, certain provisions of the Rome Statute of the International Criminal Court (ICC)<sup>33</sup> may reveal the factors that have changed the "cost-benefit" calculus of states.

<sup>30</sup> This is the international law version of the tale of Ulysses and the Sirens; we believe that international law is frequently used as a "precommitment strategy" in this manner.

<sup>31</sup> For a particularly thoughtful discussion of this and other apparently arbitrary legal distinctions in international humanitarian law, see Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237 (1998).

<sup>32</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 UNTS 609.

<sup>33</sup> Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9\* (1998), reprinted in 37 ILM 999 (1998) [hereinafter ICC statute].

L&E identifies additional reasons why states have interests in binding other states to observe humanitarian norms in internal conflict. For example, states may experience various types of externalities as a result of human rights violations in internal conflicts in other states. First, as ongoing conflicts in Kosovo and the Congo dramatically illustrate, internal conflict often produces direct externalities, such as significant refugee problems and the potential contagion of armed conflict into neighboring states. Less direct externalities include possible demonstration effects: rebellion in one state may encourage rebellion in another and violation of human rights in one state may increase the likelihood of violation in another. Finally, citizens in other states might experience moral externalities, in which concern for human suffering is perceived as a preference. This preference is satisfied when human rights are respected. While some may express theoretical concern about these "derivative" preferences, which relate to the protection of others, the important reason why they cannot be dismissed is simply that people act to satisfy them: therefore, a theory of rational choice would be incomplete without accommodating derivative preferences. Once we identify these externalities, the question arises whether it is useful to create legal rules that somehow "internalize" the externality. L&E would examine the costs and benefits of internalization versus the status quo. A transaction costs analysis would suggest that internalization would provide few benefits where the parties may easily transact to address the externality.

Efforts to negotiate agreements such as those described above entail transaction costs. We cannot tell whether an otherwise apparently beneficial agreement will be valuable—and will be entered into—until we assess the transaction costs that it entails. At some point, heightened transaction costs may preclude otherwise mutually beneficial agreements. In such circumstances, alternative institutions can help parties achieve their preferred outcomes. This factor may explain, for example, the important roles played by nonstate actors and international tribunals in the clarification and progressive development of international humanitarian norms.<sup>34</sup>

Situations such as those described above, often exacerbated by uncertainty regarding the actions of others and the inability to bind others, are often modeled in game theory as "Prisoner's Dilemmas."<sup>35</sup> Prisoner's Dilemmas can sometimes be overcome by greater transparency and the ability to bind other players—by in effect modifying the game or its payoff structure. This may translate into an international legal solution, including monitoring and an enforceable agreement. This simple model helps us to understand why states might be willing to enter into such arrangements: by doing so they are able to reap direct benefits otherwise unavailable.

Of course, a treaty regarding the level of protection alone may not be sufficient to overcome the Prisoner's Dilemma. Just as domestic contracts would be of limited legal value if there were no state to supply courts and sheriffs, so must this kind of agreement be accompanied by commitment techniques that provide some assurance that the agreement will be performed. Otherwise, the treaty will not suppress incentives to defect.

<sup>34</sup> See, e.g., Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 *JIL* 238 (1996) (discussing role of ICRC); Symposium Panel, *The Contribution of the Ad Hoc Tribunals to International Humanitarian Law*, 13 *AM. U. INT'L L. REV.* 1510 (1998) (discussing doctrinal developments in Tribunals for Rwanda and former Yugoslavia).

<sup>35</sup> But see Jeffrey L. Dunoff, *The Death of the Trade Regime* (unpublished manuscript, on file with authors) (arguing that characterization of international settings as "Prisoner's Dilemmas" presenting a cooperation problem often obscures underlying distributional conflicts); Duncan Snidal, *The Game Theory of International Politics*, 38 *WORLD POL.* 226 (1985) (critiquing overuse of "Prisoner's Dilemma" as metaphor or analogy, and urging more refined and nuanced use of game-theoretical concepts).

In this context, agreement to universal jurisdiction or some kind of "extraterritorial" jurisdiction, or an international court with mandatory jurisdiction, may help to suppress incentives to defect. That is, if the home state does not prosecute, it will be open to foreign or international tribunals to prosecute. The options of universal jurisdiction or an international tribunal with mandatory jurisdiction may be structured to create an incentive for domestic tribunals to prosecute.<sup>36</sup>

The different jurisdictional provisions of the ICTY and ICC statutes help to illustrate how treaties can be structured to provide incentives. The Statute of the ICTY<sup>37</sup> recognizes that national courts have concurrent jurisdiction over crimes within the competence of the Tribunal but expressly declares that "[t]he International Tribunal shall have primacy over national courts."<sup>38</sup> The ICC provision, in contrast, rejects the principle of "primacy" in favor of that of "complementarity." Under this principle, the ICC will take jurisdiction over a case only where national courts either cannot or will not exercise jurisdiction.<sup>39</sup>

What can explain this difference between the two statutes? We start from the premise that international criminal courts are, in general, not designed to replace or displace national courts. To the contrary, "[a] primary aim of an international court must be to compel national judicial systems to do the job they are supposed to be doing: to investigate and prosecute genocide, crimes against humanity, and war crimes."<sup>40</sup> The ICTY has jurisdiction only over crimes committed in the former Yugoslavia. Given the widespread perception that tribunals in the states that used to be part of the former Yugoslavia could not provide fair trials, a primacy provision makes sense.

But the ICC will have jurisdiction over crimes committed in numerous states. Presumably, some of these states will have well-functioning judiciaries acting under appropriate mandates, while others will not. This provides an argument against the "primacy" granted the ICTY and in favor of "complementarity," or jurisdiction only where national courts either cannot or will not exercise jurisdiction.<sup>41</sup> Such an approach provides an incentive for domestic courts to act. If they do so, they avoid the embarrassment and perhaps the adverse result (the "price") of having cases that should be in their jurisdiction tried in an international forum. This "sanction" will likely increase the probability that domestic courts will try appropriate cases, a benefit that accrues to all parties. Perhaps less obviously, this jurisdictional structure also promotes the mutual interests of parties to the statute. That is, a strategically designed jurisdictional provision that imposes a "penalty" for failure to prosecute increases the likelihood of prosecution and thus, in theory, increases the expected joint returns from entering the agreement.

<sup>36</sup> At the same time, of course, universal jurisdiction and international courts also change the incentive structure of would-be violators, as the heightened risk of prosecution will affect the calculus of the costs and benefits of the crime.

<sup>37</sup> For the Statute of the International Criminal Tribunal for the former Yugoslavia, as adopted by the Security Council, see Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808, UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993) [hereinafter ICTY Statute].

<sup>38</sup> *Id.*, Art. 9(2). The *Tadić* case, where Germany transferred the case from its own courts to the ICTY, provides an example of this primacy. Identical language on primacy is found in Article 8 of the Statute creating the Rwanda Tribunal. The International Criminal Tribunal for Rwanda was created on November 8, 1994, by Security Council Resolution 955. SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1598 (1994).

<sup>39</sup> ICC statute, *supra* note 33, Art. 17.

<sup>40</sup> David J. Scheffer, Ambassador-at-Large for War Crimes Issues, Address before the Commonwealth Club, San Francisco, CA (May 13, 1998) (visited Apr. 15, 1999) ([http://www.state.gov/www/policy\\_remarks/1998/980513\\_scheffer\\_war\\_crimes.html](http://www.state.gov/www/policy_remarks/1998/980513_scheffer_war_crimes.html)).

<sup>41</sup> In this sense, "complementarity" is actually a form of conditional "primacy" for national courts over the ICC.

### III. THE IMPLICATIONS OF THE LAW AND ECONOMICS ANALYSIS AND PERSPECTIVE ON ALTERNATIVE METHODS

Unlike traditional positivism, traditional natural law theory, feminist legal theory, critical legal theory, the New Haven School and other approaches, but perhaps like some modern international relations theory, L&E makes few, if any, assumptions about the nature of the international legal system itself.<sup>42</sup> That is, L&E is agnostic regarding many of the key assumptions that animate other approaches to international law. Consider, for example, the debate over whether the primary actors shaping the international system are monolithic states, as some "positivists" or "realists" suggest; or disaggregated domestic institutions and other actors in international civil society, as liberals sometimes suggest;<sup>43</sup> or concentrated and powerful economic interests, as critical legal scholars sometimes suggest. Much of the strength of these various approaches turns on the plausibility of their assumptions regarding the identification of the key actors in the system. In contrast, economic methodologies may be usefully applied to the behavior of states, domestic institutions and private actors, as well as to their interaction. Economic methodologies bring no preconceptions to these debates, and do not insist on monocausal analyses or explanations. On the other hand, as discussed below, L&E provides a rationale, context and limit for positivism, and is hospitable to some of the concerns of feminist legal theory, critical legal theory and the New Haven School.

Given its commitment to methodological individualism, L&E is supportive of a type of positivism that respects the law as actually legislated, and L&E methods are well suited to analysis of the "traditional" sources of law, such as the contractual type of exchanges often found in treaties.<sup>44</sup> Moreover, to the extent custom is understood as an implicit version of the explicit bargains struck in treaties, L&E methods are similarly applicable. L&E scholars often favor contract and so-called autonomous law over government-imposed law.<sup>45</sup> These prescriptions would endorse the structure of the international legal system, which, of course, relies heavily on contract and autonomous law, and lacks a centralized government with enforcement powers.

L&E methods, like all methods, have their limitations. In the context of this brief essay, we can no more than list some of the critiques.<sup>46</sup> First, these methods are dependent upon the quality of their underlying assumptions, such as the "rationality" assumption. Given the emphasis on generating testable hypotheses, we are less interested in whether the assumptions are descriptively accurate than in whether the methods that use these assumptions generate accurate or inaccurate predictions.<sup>47</sup> Of course, unrealistic assumptions may tend to systematically distort predictions, and several conventional L&E methodologies have been attacked on this basis.<sup>48</sup> This tendency may be especially pernicious where theorizing is used as a basis for policy prescription, without empirical testing.

A second important limitation is that most L&E approaches treat preferences as exogenous. That is, preferences are taken as "given," and then L&E methods are used to develop strategies designed to maximize satisfaction of these preferences. But influential recent scholarship suggests that state preferences are not exogenously given but, rather, constituted

<sup>42</sup> Of course, law and economics methodologies require assumptions, as we discuss below.

<sup>43</sup> See, e.g., Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept./Oct. 1997, at 183.

<sup>44</sup> Indeed, much of treaty law can fruitfully be analyzed in L&E terms. See Dunoff & Trachtman, *supra* note 2, at 28-36.

<sup>45</sup> We emphasize that this reflects political prejudice more than inherent qualities of L&E methods. See *id.* at 3-9.

<sup>46</sup> For a fuller discussion, see *id.* at 44-49.

<sup>47</sup> See MILTON FRIEDMAN, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 3, 14-16 (1953).

<sup>48</sup> See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

by a process of ongoing interactions among states and nonstate actors.<sup>49</sup> We read this scholarship as suggesting that preferences often reflect, in part, existing political, legal and institutional arrangements. This position poses a logical obstacle to attempts to explain institutions or rules as simple aggregations of preferences; when preferences are a function of legal rules, these same rules cannot, without circularity, be justified by reference to the preferences. It also suggests a dynamic element that is missing from some forms of L&E analysis (as well as the other methods explored in this symposium).

Finally, the price theory and cost-benefit analysis component of L&E analysis presupposes the ability to compare the "costs" and "benefits" of various choices across many actors. But such a comparison may not be possible. Many of the "goods" at stake in international legal issues—national security, human rights and the like—may be relatively incommensurable. While incommensurability raises substantial theoretical problems,<sup>50</sup> we offer two observations. First, incommensurability issues arise even in thoroughly monetized exchange markets: a medicine may cost a hundred dollars a month but have infinite value to someone of limited means whose life depends on it. Second, the legal (and political) system may be viewed, in L&E terms, as the very institutions where choice among incommensurable goods appropriately occurs.

Each of these limitations raises serious issues. But—as L&E analysis itself suggests—the relevant inquiry should not simply probe the strengths or limitations of L&E methods.<sup>51</sup> Rather, the appropriate question should be comparative: given the various strengths and weaknesses of the various approaches available, which is best suited for any particular problem? This is one reason why we find this symposium so welcome.

Another is that L&E is capable of speaking to and learning from the other methods included in the symposium. Law and economics is an eclectic set of rationalist analytical tools that may be used to describe and evaluate whether a particular law or institution achieves the ends of its individual participants. These ends include not only the basest consumption needs, but also the noblest aspirations of the human spirit: for justice, compassion and beauty. In order to claim explanatory power, economics must recognize as valid the concerns of women (and other oppressed individuals and groups) that are not expressed in the market, and incorporate these concerns into its description and prescription. The liberalism of law and economics respects the preferences of each individual and inquires how individuals can rationally achieve their preferences more effectively together.

The L&E perspective shares with the realist branch of international relations theory respect for the interests and power of states and is also broadly consistent with the institutionalist branch of international relations theory. But there are important differences. For example, so-called IR realists often fail to account for the very *real* effects of domestic constituencies, nongovernmental organizations, and international law and organization. IR institutionalists, on the other hand, often misread Coase to the effect that institutions are always good whenever there is "market failure"—which is all the time in international relations (and in domestic society). Neither political institutions nor markets are perfect; as noted above, law and economics analysis seeks the least imperfect institution.

<sup>49</sup> See Harold H. Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997); Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996). For similar arguments, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1995).

<sup>50</sup> See Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431 (1996).

<sup>51</sup> The tendency of scholars to identify defects in a given institution, rule or methodology and then to propose change without fully considering the defects associated with the proposed alternative regime has been labeled the "nirvana fallacy." See, e.g., Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969).

The New Haven policy-oriented jurisprudence described by Siegfried Wiessner and Andrew Willard and the legal process school outlined by Mary Ellen O'Connell also seem to have affinities with law and economics. In fact, it would not surprise us if these schools were to reach similar results to those law and economics prescribes, at least in the context of the problem posed by this symposium. But there are several reasons why one might prefer L&E to these schools. First, while these schools ask many questions that seem important, they provide no satisfactory explanation of *why* these are the right questions, nor do they delimit the salience or domain of these questions. Law and economics provides a more explicit rationale for, and a stronger contextualization of, the analysis it would prescribe; it also acknowledges the utility and limits of its analytical techniques. In addition, both schools, at least as presented here, seem to assume a consensus on underlying substantive values that the international community often lacks. L&E does not presuppose such a consensus, and can be used to analyze situations of international conflict as well as cooperation.

We have other reservations about these schools. International legal process places undue emphasis on the role of courts; in fact, of course, most of international law is made, interpreted and applied outside of formal adversary procedures. Moreover, the international extension of "legal process" is suspect for much the same reasons that have discredited the domestic version—its implicit assumptions that law can be treated as a self-contained doctrinal system, and that procedural mechanisms can be substituted for substantive values.

While offering a rich and influential vocabulary for understanding international legal issues, the New Haven School likewise suffers from limitations. Many of these arise out of this school's failure to distinguish clearly between law and politics. As a result, many leading New Haven theorists have tended to merge law into policy, arguing for the lawfulness of what they perceive to be good policy and too readily supporting legally questionable activities conducted by the most powerful states.

Martti Koskenniemi's vision of critical legal studies raises a number of important issues. While space limitations preclude a full response, we wish to outline a reply to the arguments about the impossibility of meaningful choice among scholarly methodologies, and the related claim that theory is irrelevant to practice.

Koskenniemi argues that there is no external or objective position from which we can choose among the various scholarly methods surveyed here, and hence that it is impossible to make an objective or disinterested choice of one method (or more) as any better or worse than any other. Yet such an antifoundationalist position seems impossible to maintain, and Koskenniemi's argument seems to vacillate between nihilism and echoes of natural law theory. While Koskenniemi finds no position or method more deserving of our commitment than any other, his argument reveals a series of commitments. For example, he would seek a law, unlike current law, that can fully articulate "experiences of injustice" and, apparently, either no rules about genocide, or rules not "infect[ed] . . . with the uncertainties and indeterminacies that inhabit all [legal] demonstration."<sup>52</sup> Paradoxically, both of these presuppose a rich model of what law is or should be—but it is precisely this type of commitment to a scholarly model of law that, Koskenniemi argues, is impossible to justify meaningfully.

Moreover, like natural law theorists, Koskenniemi simply presents, rather than defends, his commitments. Law and economics would take the conjecture that no rules about genocide are preferable to legal rules infected with uncertainties and subject it to testing. It could assume an abhorrence of genocide, but then examine which mechanism works better to implement that value: a law with possible exceptions, or unconstrained political force. It could look at historical examples or analogues to see how things have

<sup>52</sup> Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AJIL 351, 358 (1999).

worked before. In short, law and economics would seek to test Koskenniemi's hypothesis. Should one who hates genocide not accept a law against it if experience were to show that law serves better to prevent and punish genocide than no law?

We reject Koskenniemi's claim that theory is irrelevant to practice. Indeed, as Koskenniemi himself notes, his theoretical understanding of the rhetorical conventions of legal practice have enabled him to choose which arguments are more likely to be successful when presented to the Finnish Foreign Ministry. More important, this claim conflates "theory" with "normativity." L&E understands "theory" as a method for generating testable hypotheses, rather than as a set of normative claims about what law is or should be. Finally, Koskenniemi's claim is simply incorrect as an empirical matter. To the contrary, international legal theory, including many of the methods surveyed here, has significantly affected the understanding and application of many international legal rules and doctrines.<sup>53</sup>

To the extent Koskenniemi wishes to direct our attention to the inherently and unavoidably value-laden aspects of different scholarly frameworks, we applaud—and have tried to contribute to—this effort. But there is deep irony in using the inability to claim an "objective" viewpoint as a rationale for refusing even to try to discuss contested legal issues. As Koskenniemi would surely agree, lawyers and scholars unavoidably make value choices—even when they try not to choose. As this symposium illustrates, debate over these value choices is at the heart of the best legal scholarship; engaging in this enterprise, we believe, is considerably more meaningful than a shopping spree at the local mall.

### CONCLUSION

This symposium demonstrates that international lawyers are moving beyond the arid natural law–positive law debate to develop a more viable theoretical perspective. In the past, international legal scholarship too often combined careful doctrinal description with unfounded prescription. But the lack of a persuasively articulated connection between description and prescription undermined the prescription. Increased attention to methodology can address this problem, which may be the most enduring consequence of this symposium.

Our brief essay has attempted to suggest how L&E may be used to analyze international legal questions generally. We believe that these methods have much to offer the international lawyer. While the tools offered are similar to those that international lawyers have long used, L&E provides a rationale for using these tools and locates them within a broader theoretical and methodological framework. Furthermore, these tools provide more highly specified and formalized techniques. These techniques are powerful analytical, pedagogical and rhetorical devices that can illuminate international legal issues, and thereby enhance international legal discourse.

JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN\*

<sup>53</sup> A particularly relevant example is the influence of feminist scholarship on our understanding of rape and other forms of sexual violence as a war crime. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AJIL 379 (1999). In arguing for the influence of theory on practice, we, of course, echo Keynes. See JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 383 (Harcourt, Brace & World 1964) (1936) ("Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist.").

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The authors benefited from perceptive comments on previous drafts from Jane Baron, Richard Greenstein, Hurst Hannum, David Post, Alfred P. Rubin and David Skeel.



## THE METHOD IS THE MESSAGE

We structured this symposium on the premise that comparison reveals critical differences. We asked our authors, as noted in the introduction, to describe their methodology, apply it to the concrete problem of accountability for atrocities in internal conflict, and discuss its merits and demerits relative to other approaches presented in the symposium. We threw out these questions as a means of structuring a debate in a way that would be most helpful to our readers and that would encourage our authors to engage with each other as self-consciously as possible. We did not seek competition as an end in itself, but as a spur to self-reflection.

We had two deeper goals. The first was explicitly educative: to bring together in one place a range of different theories or approaches or schools of international law in a way that would allow the readers of the *Journal* to understand them better. Insisting on an analysis of a common problem was a way of moving authors beyond the abstractions of exposition, to help pinpoint similarities and differences. The second, as outlined in the introduction, was to contrast a number of different theories in a way that is directly relevant to our collective goals and hopes as both an academic and a practical discipline. As this symposium goes to press, NATO bombs are falling in Kosovo while NATO planes are airlifting the refugee victims of ethnic cleansing. Augusto Pinochet has been stripped of immunity, but may still not be brought to justice. International lawyers cannot solve these problems, but we must have something to say about them. We thus defined "method" as "applied theory," in the hope that the symposium would illuminate many different ways to approach a particular problem.

To the extent that there is a method to this conclusion, it adopts the relatively straightforward approach of canvassing various authors' answers—insofar as they can be found—to the different questions posed and commenting on the resulting comparisons. The difficulty here, particularly as regards a symposium in which the idea or even the possibility of objectivity comes in for heated discussion, is denying our own preferences. Both of us, as scholars rather than co-editors, have aligned ourselves with particular methods: Ratner with policy-oriented jurisprudence (although not exclusively) and Slaughter with international law/international relations theory (IR/IL). Having disclosed this fact, we leave it to the reader to decide whether we unfairly tip the scale.

More generally, however, we make no effort to rank methods here, in terms of either intrinsic merit or their application to the question of liability for atrocities in internal conflict. Nor do we attempt to referee disputes between methods. "Better" or "worse" is not the issue; indeed, as the authors themselves reveal, different methods pursue different aims and are often complementary. Moreover, the choice between them is complex and often highly personal, reflecting not only relative utility in addressing a particular legal problem, but also a set of choices about what kinds of problems to address. In this context, the method chosen is the message—a message not only about who we are but about what our discipline should be.

### I. THE NATURE OF INTERNATIONAL LAW

Our opening question asked the authors to consider what assumptions their method makes about the nature of international law. They answered directly and indirectly in the expository parts of their essays. The principal divide, not surprisingly, is between methods that conceptualize law primarily as a body of rules and those that see it as a more dynamic set of processes. Other ways of addressing this question include ontological versus purposive inquiries—what law *is* versus what it is *for*—and instrumentalist versus noninstrumentalist—whether it can usefully be *for* anything.

According to Bruno Simma and Andreas Paulus, classical positivism assumes that international law is a unified system of rules created deliberately and explicitly by states. But they advocate a modern, modified positivism that takes a broader view of the ways and fora in which states can express their will. In addressing the problem, they worry repeatedly over the absence of state practice concerning the criminalization of crimes against humanity and particularly ordinary war crimes in internal conflict. In both cases they end up looking to the practice of international tribunals, and of states in accepting the jurisprudence of those tribunals. It thus appears that international law can now result from collective state action through international institutions, notwithstanding the power and politics that so often dominate institutional life and obscure and suppress the will of individual states.

Writing from a feminist perspective, Hilary Charlesworth sees international law as a set of rules that reflect the preoccupations of their creators—all of whom have traditionally been men. Thus, in the context of the problem, international humanitarian law protects what men know and care about: primarily the defense of warriors' honor and the sanctity and chastity of their mothers and wives. Conversely, Charlesworth credits women's organizations with successfully lobbying for crimes against women to be included in the jurisdiction of the Bosnia and Rwanda Tribunals. The rules of international law, however, are not purely instrumental. The law as a whole, including texts, institutional practices (ranging from trial practices before international tribunals to the distribution of humanitarian relief by international organizations) and decisions by individual government officials, takes on a life of its own. It *constructs* concepts such as rape and sexual assault in ways that create particular images and evoke particular values, and that eventually define what is known and what is deemed even to exist.

The feminist view of the nature of law is conditioned by its focus on one very large problem: advancing the rights, status and dignity of women worldwide. Policy-oriented jurisprudence, on the other hand, considers law from the perspective of a range of decision makers who have to address an actual policy problem. The law itself is not a body of rules, but a stream of authoritative decisions. This approach to law and lawyering is nicely illustrated by Siegfried Wiessner and Andrew Willard's treatment of the problem. They begin by cataloguing international prescriptions reflecting community responses to the question of how to protect individuals from human rights violations. They list virtually all the instruments that the positivists turn to: the Charters of the Nuremberg and Tokyo Tribunals, the Genocide Convention, the Geneva Conventions, the Statutes of the Bosnia and Rwanda Tribunals, and the newly negotiated statute of the international criminal court. They also add the actions and decisions of national courts, such as those involved in the *Pinocket* case and various cases brought in the United States under the Alien Tort Statute, as well as national institutions such as truth commissions and lustration bodies. Wiessner and Willard's point, however, is that these instruments are only tools for policy makers to use in the service of minimum public order. They have no significance in and of themselves; they are simply the carapace that the international community constructs in trying to address a problem. Thus, in applying their method, Wiessner and Willard never seek to answer the question whether "international law" does or does not hold individuals accountable for atrocities in internal conflict. They instead offer a script for addressing the problem: defining human rights, contextualizing them, identifying the violators and the victims, and developing policy alternatives.

Traditional international legal process (ILP) takes a less radical view of law, but similarly focuses less on the exposition of rules and their content and more on how international rules are actually *used* by foreign-policy makers. The context varies widely; Mary Ellen O'Connell examines the question of prohibiting atrocities in internal conflict by looking not only to treaties and customary law norms, but also to decisions by national

and international courts, truth commissions, and government officials. She thus cites decisions by Turkish officials not to prosecute human rights violations by Turkish troops, the conviction of a Croatian war criminal by a Danish court, and the findings of the Guatemalan Historical Clarification Commission as evidence for whether individuals are or are not being held accountable. New ILP assumes the same range of possible sites for locating the law in practice, but each one, such as the *Tadić* decision analyzed by O'Connell, can be critiqued from the perspective of global community values.

For Jeffrey Dunoff and Joel Trachtman, writing from a law and economics (L&E) perspective, international law is partly a set of norms expressing individual, rather than state, values. This conclusion flows from their commitment to methodological individualism, leading them to focus on the state only as a mediating institution rather than as an autonomous entity with its own normative value. At the same time, L&E takes no position on the content of individual values, either singly or as aggregated by the state. Its method thus focuses on the functionalist dimension of international law, rules designed to achieve whatever norms are adopted.

Given this starting point, Dunoff and Trachtman can only approach the problem by assuming that the overarching goal is to stop the commission of atrocities in internal conflict. To achieve this goal, they pose a set of questions that ask "what the proscription should be, to whom it should apply, by whom it should be enforced, and what the penalties should be."<sup>1</sup> The lawyer's task is to identify the right incentive structure to motivate the desired behavior, through either prohibition or inducement, and then to design rules and institutions that will maximize compliance.

IR/IL assumes that "law" is a discrete and identifiable entity that can be studied as either an independent or a dependent variable. Different schools of IR theory make different assumptions about what this entity is, from realist positivism to the constructivist view of law as a constitutive global practice. For Kenneth Abbott, the "atrocities regime" includes formal instruments such as the Geneva Conventions and the charters of international tribunals, customary law norms and soft law of various types, and legal and quasi-legal institutions ranging from international tribunals to national courts to truth commissions. But what he seeks to study is not the rules themselves but, rather, the political struggle attendant on their creation and design, the complex process of giving them meaning, and their actual impact on human and state behavior. His method may be as functionalist as L&E, but, true to the discipline it seeks to incorporate, it assumes that all dimensions of international law are embedded in a deeply political context.

For Koskenniemi, the only way to give international law any concrete existence or coherence is to understand it as a "linguistic reality." "The world out there" is a mirage, a projection of an infinite number of personal perspectives—many of which can be projected by the same individual playing different roles. But international lawyers exist, advancing, attacking and defending whatever positions their clients require or they desire. The corpus of international law is a limited set of argumentative rules that allow them to pursue these projects through highly ritualized and formal sets of arguments.

## II. THE DECISION MAKERS

"Who are the decision makers?" we queried. We meant not only the decision makers relevant to lawmaking, but also those interpreting, applying, implementing and even violating the law. In other words, whose actions matter in each method's universe? Three issues emerge. First is whether the identity of different decision makers makes any

<sup>1</sup> Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AJIL 394, 399–400 (1999).

difference to international legal analysis directed at those decision makers. Second is the statist/nonstatist divide: between those methods that envision the international system as populated primarily by states—or at least by various state institutions—and those that attempt to systematize a much more pluralist vision encompassing a range of state and nonstate actors. And third is the conceptualization of “the state” itself as a decision maker—as a fictional unitary entity or as an aggregation of institutions and individuals.

### *One Law or Many?*

For policy-oriented jurisprudence, critical legal studies (CLS) and feminism, who the decision makers are in international law is critical to any analysis of what the law is and/or what it should be. As Wiessner and Willard explain, a core premise of policy-oriented jurisprudence is the way perceptions of “the law” shift depending on identity and institutional role. As a result, they find that Koskenniemi’s range of experiences and attendant conceptions of law as a scholar and a Finnish government official are predictable and understandable. But they are no obstacle to either a positive or a normative assessment of “the law” in different contexts; it is simply a critical part of that assessment to be aware of the identity of both the observer and the audience.

CLS, on the other hand, denies the possibility of even this limited objectivity. Koskenniemi inverts international law to the multiple practices of its participants: the full academic, official and activist panoply of international lawyers. The relevant decision makers are these individuals; moreover, their decisions are highly personal. They choose different methods and modes of argument as “styles,” ways of being that reflect choices ranging from types of friends to the most effective means of taking pragmatic action. The “law” does not exist to be perceived differently by these different decision makers; they instead constitute the law for multiple purposes and from multiple perspectives. CLS overlaps here with some antipositivist strands of constructivist IR theory in insisting that each decision maker constructs her own reality.

Feminist jurisprudence offers the clearest answer to the question of who the decision makers are: men. International law has been almost exclusively made by, for and about men. Charlesworth also draws the clearest implications from the differential identity of decision makers for international legal analysis. If women’s identities and interests were properly considered in all the processes of international law, she argues, international criminal law might also penalize the deprivation of women’s economic, cultural and social rights, “private” rape and domestic violence. The complete isolation and submission of women by the Taliban might merit as much attention as the systematic rape/genocide policies of the Bosnian Serbs. The very notion of “conflict,” whether internal or international, as a trigger for international legal regulation, might disappear. As it stands, however, the overwhelming predominance of men in the halls of New York, Geneva and foreign ministries around the world means that international criminal law combines “the gendered blind spots” of both international humanitarian law and human rights law.

### *A Wider World of Law*

If international law is a body of rules that apply equally to all, then although anyone can make decisions, only the lawmakers are of any consequence. And the lawmakers in the positivist world are states, personified by their representatives. It is a drab world of endless official corridors, but the identity of most decision makers for most purposes is beside the point. For the New Haven School, by contrast, the definition of law as a process of authoritative decision means that the identity of the decision makers is crucial. In practice, they can include nation-states, intergovernmental organizations, non-self-governing territories, auton-

amous regions, indigenous peoples, and a host of private actors such as the media, nongovernmental organizations (NGOs), corporations, private armies and individuals. Which of these actors are actually important varies according to the specific question posed; on issues of individual accountability for atrocities, for instance, victims, NGOs and now governmental elites have had a particularly influential voice.

Classic ILP also paid much more attention to the identity of decision makers, but less for jurisprudential than for heuristic purposes. To trace the actual impact of law, lawyers and legal institutions on foreign-policy making, Chayes, Ehrlich and Lowenfeld had to pay much more attention to the processes of rule creation, interpretation, implementation and violation, and hence to the identity of the actors in that process. Part of classic ILP's intent was to move away from an exclusive focus on courts and judgments as quintessential legal institutions and instruments; thus, it is somewhat ironic that O'Connell reviews the activity of national courts, truth commissions and international tribunals in trying to assess the extent to which individuals have in fact been brought to account. But, true to ILP tradition, her analysis lays the foundation for a pragmatic assessment not only of the principal actors in this issue area, but also of the strengths and weaknesses of each one.

O'Connell's application of new ILP takes a further judicial turn by critiquing a decision rendered by the appeals chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), an entity that qualifies as a "duly established decision maker" empowered to fill gaps in positive law on the basis of distilled global values. She explains her choice on the ground that legal process generally emphasizes institutional settlement and that new American legal process, as developed by Eskridge and Frickey, has focused primarily on judicial decision making. But it may also prove true that adding a normative dimension to ILP will naturally refocus attention on national and international courts as the normative terrain on which lawyers feel most comfortable.

### *Who Decides for Whom?*

Several of the methods "de-couple" the state and its representatives, acknowledging that the state can act only through individual officials but asking to what extent those officials are faithful agents for their principals. Dunoff and Trachtman apply public choice theory to international legal decision making, which suggests that "state" decisions are likely to reflect the interests of political elites more than of their constituents. In assessing the likelihood of state compliance with international rules criminalizing atrocities in internal conflict, it is thus necessary to ask whether state representatives will bear the full cost—be it politically, economically or socially—of penalties imposed on the state itself. If they will not, they are likely to lack incentives to create domestic systems designed to achieve compliance with particular international norms. In a word, Slobodan Milošević or Saddam Hussein might be more likely to direct his government to comply with Security Council resolutions if he himself bore the brunt of international sanctions imposed as a result of noncompliance. Alternatively, international conventions could incorporate specific enforcement measures and penalties to be imposed on individuals.

Much IR/IL literature takes a similar tack. Drawing on the work of James Morrow, Abbott demonstrates how distinguishing between "the state" and a specific government or individual government officials can help illuminate the grave breaches regime. Morrow sees the Geneva Conventions as based primarily on reciprocity, but with the grave breaches regime as a useful supplement to discipline high officials who would otherwise be inclined to violate the Conventions and then flee. Liberal IR theory also focuses on the relationship between governments and individuals and groups in domestic and transnational society, seeking to identify the conditions under which government

decision makers are most likely to respond to different constituencies and hence the opportunities for effective political action. Abbott cites work by Margaret Keck and Kathryn Sikkink that explains the criminalization of some atrocities but not others in terms of the political pressure generated by transnational advocacy networks and NGOs.

### III. *LEX LATA* V. *LEX FERENDA*

Only four of the methods even purport to be able to determine *lex lata*: positivism, L&E, policy-oriented jurisprudence and classic ILP, in its own way. The other methods focus on a form of *lex ferenda*, but not necessarily in the way it is classically defined. Some prefer to raise questions more than to provide answers in either category, insisting on a conception of law in larger social, political and economic context. These methods unite in a call for more empirical research on the role of law in international life.

#### *The Law As It Is . . .*

Simma and Paulus apply their "modified positivist" method and conclude that international law establishes international criminal responsibility for genocide, crimes against humanity and war crimes in internal conflict (the law is apparently still being made on this point). Institutionally, they acknowledge universal jurisdiction for genocide and crimes against humanity, but no obligation to prosecute or extradite regarding crimes against humanity. Dunoff and Trachtman, on the other hand, claim that L&E is "more positivist than the positivists." They argue for text-based interpretation to preserve the bargain actually struck by the parties to the treaty, explicitly rejecting the modified positivist search for strategies to overcome "gaps" in the law. Thus, Protocol II may be vague, but surely the ambiguity was deliberate; it should not be "fixed" by interpretation. Moreover, if the parties decided not to impose individual responsibility for violations of common Article 3 and Protocol II, it should not be imposed now.

Speaking for classic ILP, O'Connell underlines the deeply pragmatic nature of the ILP inquiry into *lex lata*. She wants to know to what extent individuals are in fact being held accountable for human rights abuses in internal conflicts. After reviewing the practice of national courts, truth commissions and international tribunals in over twenty largely civil conflicts since 1990, she finds that the answer is very few. However, the development of new rules and mechanisms for accountability, both formal and informal, is ongoing. Classic ILP seeks to understand why these mechanisms are emerging, how they are meant to function, and the reasons for their success or failure. The composite, in a broad sense, is the law as it exists, but classic ILP is less concerned with labeling or defining it than with exploring it.

Wiessner and Willard, by contrast, offer a specific and rigorously formulated definition of *lex lata*. Their method attempts to find out what the relevant actors in any given context want (their values) and how they pursue those values through legitimate (authoritative) and effective (controlling) means. This determination is highly context-dependent, leading them to offer a set of questions designed to function as "mapping procedures" to allow observers, advisers or decision makers to develop a detailed picture of a particular policy problem. They do not in the end offer an answer to the question whether individuals can be held accountable for atrocities in internal conflict, but recite different kinds of evidence supporting or opposing the proposition from a world order perspective.

#### *The Law As It Should Be . . .*

The remaining methods rely on positivism at least as their starting point to ascertain *lex lata*, even if their purpose is primarily to critique any such concept. The distinctive

features of these methods all emerge from their conception of *lex ferenda*. Each invokes a set of values to shape what the law should be. Equally important, when asked to address our problem, the authors applying these methods appear automatically to have assumed that the question posed was how to improve, reform or critique existing law. For many international lawyers, their methods will thus appear to be more specialized tools than the general notion of "legal methods" might imply.

Charlesworth takes the clearest stance. Feminist jurisprudence focuses on what the law is *not*, as a predicate for arguing what it should be. International law is not "objective" because it denies women all but the most marginal recognition—as participants, subjects, human beings. But feminist methodology not only uncovers the (male-oriented) subjectivity of international law by "searching for silences," it simultaneously develops a deep normative critique. The law "as it should be" should be responsive to women, all women in all their differences around the world. It should hear their voices, reflect their experiences, and seek to improve their lives.

Policy-oriented jurisprudence also offers a clearly defined set of normative commitments: founding and maintaining "minimum public order," defined as the elimination of unauthorized violence, and advancing toward "optimum public order," defined as a steadily increasing enjoyment of specified human values. As O'Connell points out, many critics of the New Haven School have long argued that these goals are so vague as to be either meaningless or a front for U.S. interests. But, in the context of this problem, Wessner and Willard elaborate a set of much more specific goals: not only the minimization of violence, but also the reestablishment of civil society, conflict prevention strategies tailored to specific contexts, and deterrence of actual and potential human rights atrocities by specific individuals.

A popular conception of L&E would place it alongside policy-oriented jurisprudence and feminist jurisprudence in terms of method, with the difference that the metric for defining *lex ferenda* would be "efficiency." Dunoff and Trachtman reject this normative path, choosing instead to focus on the ways that "positive economics" can contribute to international law. Positive economics cannot be used to ascertain the status or content of any particular legal rule but, rather, to assess the causes or consequences of that rule once adopted.

This view of L&E aligns with IR/IL in staking out an intermediate instrumentalist ground on *lex ferenda*. Given a legal and policy decision that individual criminal responsibility should attach for human rights atrocities, L&E can assess the costs and benefits of different sanctions as perceived by individual criminals or compare the relative merits of domestic versus international mechanisms of accountability. Abbott strikes a similar note with his emphasis on the ways IR/IL can contribute to institutional design, helping international lawyers figure out incentive structures and organizational features to achieve a particular set of institutional goals. The final section of his essay reviews alternative measures for assessing the effectiveness of judicial implementation of rules prescribing atrocities in internal conflict.

Often, of course, this line between "intermediate" and "ultimate" goals and values is not so easy to draw. Abbott and Dunoff and Trachtman all recognize that normative implications, if not choices, are embedded in the assumptions that underlie any particular school of "positive" analysis. The disciplinary commitment to methodological individualism, for instance, means that "L&E methods will tend to favor more, rather than less, representative institutions."<sup>2</sup> Nevertheless, it may reassure many readers that the two

<sup>2</sup> *Id.*, text at note 9.

explicitly interdisciplinary methods seek to harness their respective disciplines in the service of improving and implementing the law more than of making it.

### *Law in Context*

The feminist view of *lex ferenda* asks more questions than it generates answers. As Charlesworth's description of "world traveling" emphasizes, many strands of feminism are deeply contextualist, seeking to investigate the conditions that oppress or harm women regardless of formal categories. For instance, she asks why "conflict" is defined solely in terms of military and paramilitary action, noting that many women experience persistent violence at home or in times of peace in their larger societies. This method most resembles the approach advocated by the New Haven School, which equally poses questions designed to ascertain how the law operates in very specific contexts and then evaluates the answers for their congruence with a set of predetermined goals and values.

Feminism and policy-oriented jurisprudence also champion the need for sound and thorough empirical research, an area in which they overlap both IR/IL and L&E. Dunoff and Trachtman sharply criticize L&E scholarship that offers theoretical prescriptions ungrounded in empirical research, emphasizing the need to move beyond purely theoretical debates. Abbott takes the next step, drawing on empirical research concerning the conditions under which states have been more and less willing to adopt and adhere to human rights regimes. The functionalist interest-based account emphasizing mutual state deterrence of undesirable behavior predicts that the distinction between accountability for atrocities in international and in internal conflict is quite stable and likely to endure; the "liberal-constructivist account" emphasizing private political action and social values predicts that it will disappear.

The IR/IL and L&E embrace of empiricism reflects yet another way of understanding the relationship between *lex lata* and *lex ferenda*. Both methods accept a basically positivist account of *lex lata*, but then ask whether the law as formulated will have an actual impact on the behavior of state or individual actors, and if so, whether it will be the intended or anticipated impact. This focus on whether and how law actually matters in international life paves the way for a more grounded *lex ferenda*, by giving international lawyers a better "understanding of what is politically likely, and politically possible."<sup>3</sup>

## IV. PRESCRIPTIVE PROCESSES

We also asked the authors to address how their method factors in the traditional "sources" of law—the prescriptive processes by which it is made. In their accounts of what the law either could be or is becoming, they offer quite different pictures of how law comes to be. They also reveal different perspectives on the role and nature of the state as the principal actor in these processes, as well as the contribution of nonstate actors.

### *Visions of Prescription*

The positivists find that the introduction of individual responsibility for war crimes affirms traditional methods of law formation—by treaty, custom and general principles. In particular, the evolution of the law governing war crimes underlines the "element of

<sup>3</sup> Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AJIL 361, 376 (1999).



innovation" that characterizes the creation of custom, innovation that is currently taking place in ICTY jurisprudence and the Rwanda Statute. There is a dynamic picture of purely state action, but of states acting in a variety of ways and through a range of forms and mechanisms.

Policy-oriented jurisprudence offers a picture of prescriptive processes that is more interactive and conflictual. Wiessner and Willard want to know how the world community has responded (authoritatively and effectively) to conflicting claims of individual rights versus sovereign autonomy in cases of large-scale human rights violations in internal conflict. They seek to assess past trends in decision, to determine to what extent the world community has in fact sanctioned misconduct in internal conflicts. States are the principal players in this vision, but not the only players. The decision makers in the world community respond to a series of concrete problems through a variety of formal and informal means. Whether their responses constitute "law" depends not only on their intent, but also on their effectiveness.

The feminist view of prescriptive processes is encapsulated in Charlesworth's rumination on the recognition of systematic rape as a war crime, in which she acknowledges the progressive impact of feminist activism on lawmaking but simultaneously worries that international criminal law remains "primarily a system based on men's lives."<sup>4</sup> Law is made primarily by states and states are run by men. Feminist activists, operating through NGOs and national political processes, can raise public consciousness in ways that require governments to respond in some publicly visible manner but may do little to change the deeply gendered social structures that shape the law.

IR/IL offers several views of prescriptive processes, depending on the school of IR theory that is being used to inform the law. The two views of the evolution of international humanitarian law that Abbott summarizes rely respectively on state bargaining and symbolic politics in which individual activists play a critical role. In the realist account, war crimes tribunals are established when it is in the interests of great powers to do so—interests that are evident in the Balkans but not in Cambodia. Liberal and constructivist scholars, on the other hand, credit private political actors with shaping international norms and mobilizing public opinion behind them through skillful symbolic action. Abbott himself stresses the cumulative or complementary nature of these different approaches.

Dunoff and Trachtman begin by accepting that international law is strictly the product of governments and their constituents. And they certainly recognize the role of interstate bargaining, observing that each of the parties to the Geneva Conventions had a strong incentive to reach a reciprocal *ex ante* agreement to protect combatants. Elsewhere in their essay, however, they link the problem of transaction costs to the role of nonstate actors and international tribunals in clarifying and developing international humanitarian norms. They do not resolve this apparent contradiction, but in formulating their own prescriptions, they appear to imagine a much cleaner and simpler prescriptive process, one in which normative goals are already established and it is the job of technicians to see how best they might be achieved.

Finally, old ILP offers a kind of "thick description" of law in action: a stream of decisions by a range of state actors that bring legal regimes into being and determine their content and significance. New ILP, on the other hand, appears to envision a more discrete process whereby a "duly constituted decision maker," such as an

<sup>4</sup> Hilary Charlesworth, *Feminist Methods in International Law*, 93 AJIL 379, 386 (1999).

international tribunal, will interpret texts or custom in line with a range of values still to be distilled from many different participants in the international community, and will thus make new law.

### *Visions of the State*

These different visions of prescriptive processes encapsulate quite different visions of the state as the primary prescriptive actor. The debate is not, as is increasingly suggested, between statist and nonstatist. All the methods surveyed here, with the possible exception of CLS, seem willing to grant the state a *primus inter pares* status in international lawmaking. The questions of the day are rather (1) the extent to which nonstate sources should be considered alongside or as a supplement to state sources; (2) the best way to conceptualize the state as representing other actors; and (3) the need to take account of different state institutions.

On the first question, classic positivism and probably classic ILP insisted on limiting the world of lawmakers to states alone; today Simma and Paulus explicitly accept that the formal view of sources will have to track the actual process of "norm perception" in the international sphere, which may be moving away from the will of states. Policy-oriented jurisprudence, feminism and probably new ILP explicitly accord a supplementary role to nonstate actors. L&E and IR/IL seem to allow for both positions.

On the second question, Dunoff and Trachtman distinguish L&E analysis from other methods precisely on the basis of its assumption that individuals are the ultimate source of norms. A further question is the extent to which states adequately represent nonstate actors in prescriptive processes, which raises the corollary question of the extent to which international law can require broader representation and response to citizen concerns. As discussed above, L&E and liberal international relations theory address this issue directly, arguing that IL can and should favor more over less representative institutions. The New Haven School would also find various circumstances in which the value of human dignity would be best served by enhancing the representativeness of domestic institutions.

Charlesworth raises an interesting corollary of this approach. Discussing a recent case in which the Inter-American Commission on Human Rights held Peru accountable for the rape of a woman, she emphasizes the importance of recognizing international responsibility for an inadequate national structure to respond to crimes against women. Holding states accountable for crimes of omission—failing to punish a perpetrator and/or to take adequate steps to prevent the crime in the first place—may prove more effective in the long run than holding individuals directly accountable for crimes of commission. Although direct criminal prosecutions of individual perpetrators of atrocities may be more visible and more satisfying professionally to the college of international lawyers, states still maintain a monopoly on coercive power and are most capable of affecting the lives of the individuals who live within them. Recognizing the state as still at least the primary actor in the international system, but conceiving of it in terms of its relationship with its citizens, thus means focusing rules and remedies at the national rather than the international level, or at the international level only as supplemental to the national level.

On the third question, even the methods that focus almost exclusively on states recognize a broader range of state representatives than the traditional phrase "States parties" seems to connote. Simma and Paulus acknowledge that different branches of government are increasingly acting on their own behalf instead of through foreign ministries. They cite both national laws and national judicial decisions as evidence of state practice helping to establish the international customary law norm holding indi-

individuals accountable for crimes against humanity committed in internal conflicts. On the other hand, they assert flatly that the Security Council cannot legislate individual accountability for war crimes in internal conflict. Domestic judges and national legislators thus count for more than Security Council representatives as decision makers in international law.

#### V. COMPARATIVE ADVANTAGE(S)

The fifth and sixth questions we posed asked authors to consider whether their method might be better at tackling some subject areas than others, both with regard to the problem posed and in general, and to explain why their method is better than others. Many authors collapsed their answers to these questions into one, offering a general assessment of the comparative advantages of their method. Relatively few were willing to restrict their method to specific issues or issue areas. On the other hand, many authors took care to describe the context in which they found their method useful, a context often shaped by a set of normative commitments.

Before reviewing the claims that the authors make for their methods, it is striking to observe what they do not claim. The majority of authors disclaim their method's ability to provide "one answer" in terms of either what the law is or what it should be, implicitly attributing such certainty to some other method. But in fact, *no method* actually claims this ability. Indeed, the positivists—to whom the other authors often attribute this position—explicitly deny it. Thus, it appears that absolute determinacy is a myth, or more accurately, a straw man. The debate should instead be recast in terms of *relative* indeterminacy: between methods insisting that because there is no *one* answer, any answer is possible, and those that contend that even in the absence of a single answer, some answers are manifestly better than others and that the lawyer's job is to narrow that range.

#### *Methods and Issues*

The links between specific methods and issues remain largely inferential. Dunoff and Trachtman recognize the "incommensurability" problem: that while price theory and cost-benefit analysis presuppose that costs and benefits of particular choices to particular actors can be readily calculated, "goods" such as national security and human rights may be relatively incommensurable. But they certainly do not regard this objection as an insuperable obstacle, pointing out that legal and political systems may be precisely set up to make incommensurable choices. It also seems likely that feminist methods would have less to say about some issues than others, depending on their relative impact on women's lives. The international postal and telecommunications regimes, for instance, are less likely to be candidates for feminist reshaping than rules governing the use of force, human rights or economic sanctions. New ILP is similarly likely to differentiate itself most clearly on issues with a strong normative valence.

Overall, however, the authors are much more prone to differentiate their methods in terms of relative ability to determine *lex lata* versus *lex ferenda*, or relative capacity to explain the conditions under which specific international legal regimes are likely to flourish and the directions in which they are likely to develop, than in terms of specific issues. Several authors, including Dunoff and Trachtman and Simma and Paulus, also specifically noted their method's ability to withstand a strong moral pull to expand the law on issues such as human rights atrocities.

#### *Comparative Contexts*

As discussed in the introduction, a second basis of comparison concerns the use of different methods in different contexts—from practicing lawyers of various types to

academics. Koskenniemi characterizes the symposium as a competition to determine "who is going to be the diplomat's best helper."<sup>5</sup> The positivists readily accept this characterization, arguing that the principal function of an international lawyer is to identify concrete restraints on state representatives. However, adherents of many of the other methods see their function quite differently.

Wiessner and Willard offer an analytical construct that can be used for multiple purposes, from "scholarly appraisal" to "strategic intervention," by scholars, advisers and decision makers. O'Connell also takes a broader perspective: new ILP appears to speak to the international community as a whole, although it might be most relevant to the specific institutions, such as international tribunals, that it empowers as duly established decision makers. Speaking for IR/IL and L&E respectively, Abbott and Dunoff and Trachtman would agree that their methods are of value to the diplomat, but to the diplomat who needs more than conventional legal services. Both methods focus more on opportunities than on constraints—opportunities to build a stronger and more effective international order. As Dunoff and Trachtman see it, L&E offers a wealth of "useful theory."<sup>6</sup>

Charlesworth contends that feminist methods cannot be understood as alternatives to the other methods; they are intended to start a conversation rather than yield a "single, triumphant truth." While the "diplomat" seeks to know what the law is, feminist methods respond by raising his consciousness concerning not only the plight of women worldwide, but also, more fundamentally, the way that what he takes to be "objective" and "impartial" international legal rules are in fact deeply gendered. Finally, the role of CLS is ultimately to question, to challenge, to unsettle. The status quo is the enemy—whatever it may be. It is thus not surprising that Koskenniemi warns the critics to be prepared to turn their tools on themselves and deconstruct deconstruction. The critics' comparative advantage is fighting complacency.

### *Comparative Commitments*

It is tempting to rank the methods, in the order listed above, as relatively better, or more "useful," for the practitioner, the policy maker, the reformer or system builder, the advocate, and the professional critic. Lawyers perform all these roles, but are they all properly part of the legal profession? Our authors disagree. Simma and Paulus, for instance, draw a sharp distinction between law and policy. They acknowledge that policy-oriented jurisprudence, IR/IL and L&E may be very valuable for analyzing decision-making processes and formulating policy proposals. In their view, however, such activity is not lawyering: the provision of "guidance" to "real-life decision makers."<sup>7</sup>

Most American-trained lawyers, at least, accept the legal realist deconstruction of this distinction. They define themselves primarily as problem solvers, a role that involves lawmaking as much as law finding, policy evaluation as much as textual interpretation. International lawyers like Abbott, Dunoff and Trachtman thus assume as a matter of course that lawyers ask many questions other than What is the law? or even What should it be? and that the answers to those questions are as likely to be found in other disciplines as they are in treaty texts or state practice.

Yet this particular divide cannot simply be Anglo-American versus European; Koskenniemi, after all, is equally European and his description of the Finnish legal academy, at

<sup>5</sup> Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AJIL 351, 352 (1999).

<sup>6</sup> Dunoff & Trachtman, *supra* note 1, at 394.

<sup>7</sup> Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AJIL 302, 305 (1999).

least, portrays a quite heterodox and interdisciplinary place. Nor can Simma and Paulus be so easily pigeonholed; they are all too aware of positivism's unfashionable reputation as the repository of "old-fashioned, conservative, continental European nineteenth-century views" but choose to defend it anyway.<sup>8</sup> Moreover, policy-oriented jurisprudence took Legal Realism to heart and sought to reconstruct international law on its foundations; yet it comes in for equal, if not greater, criticism by other Anglo-Saxon lawyers, based both within and outside the United States.

Conceptions of role and hence choice of method are less likely to be informed by geography than by differing understandings and beliefs about how each individual lawyer can best advance her or his normative commitments. Abbott expresses this point most directly in his response to Koskenniemi, in which he insists that the choice of "style" as a lawyer "reflects (and shapes) one's personal and professional goals." "My goals as a lawyer, scholar and teacher," he writes, "are . . . to better understand and communicate the functions, origins and meanings of legal rules and institutions, and thereby to contribute, in even a small way, to improving global governance and ultimately the human condition."<sup>9</sup> "Improving global governance and ultimately the human condition" is a mantra with which few international lawyers would disagree; some version of these sentiments must lie at the core of any choice to embrace international law as a career.

The question is how best to advance these goals. For the positivists, sticking close to concrete rules is the best hope of knitting together a minimum world order in the face of enormous cultural and political diversity. For Charlesworth, challenging deeply held assumptions about the "objective nature" of international law—so deep as to be essentially invisible—is the only way to bring the needs of the women of the world into focus. Wiessner and Willard claim that their method produces legal analyses directly oriented to helping policy makers address vital and immediate global problems. O'Connell sees new ILP as helping identify and achieve the values of a global community. Dunoff and Trachtman hope to motivate empirical research that will provide as concrete answers as possible to instrumental questions. Koskenniemi, too, has his normative agenda; he passionately believes that how we talk about law can blind and deafen us to the demands of justice. Translation of social, economic and political needs into legal claims is a transformation of lived and felt experience into the dry distance of words and concepts—a transformation that lawyers need to remember even as they conclude that they cannot find a better or more effective way to advance their cause.

#### CONCLUSION

This symposium is designed to facilitate a comparison of method, not only in the instrumentalist sense of which method may be better for which purposes, but also in the deeper sense of aiding comparative understanding, whereby different methods come more sharply into focus relative to one another. The questions we have posed to our authors were designed to encourage introspection as much as self-promotion. Exposing assumptions about the nature of international law, the identity of decision makers in the international system, the relationship between *lex lata* and *lex ferenda*, and the processes of lawmaking naturally leads to the next level of inquiry: why make these assumptions rather than those? The answer, we suggest, lies in perceptions of comparative advantage in performing a particular professional role, a role that is itself shaped by a set of

<sup>8</sup> *Id.* at 302.

<sup>9</sup> Abbott, *supra* note 3, at 363–64.

normative commitments. From this vantage point, the underlying premise of the symposium is that the practice of a particular method is a matter of choice, for our readers as much as our authors, and that it is a choice that should be as self-conscious as possible.

Viewed only in this light, however, the symposium risks being seen as a voyage in collective narcissism. We also sought to focus our authors' attention on a problem of pressing importance in international life, to move beyond often arid theoretical debates. Indeed, the application of theory to a concrete problem is at the core of our definition of method. In rising to this challenge, our authors have demonstrated not only the relative merits of their methods, but also the value of having a wide range of methods to bring to bear on issues that stir the conscience and move us to professional and personal action. It thus seems appropriate to end on a cumulative, rather than a competitive, note by suggesting at least one way to put these methods together.

How should we address the problem of atrocities committed in internal conflict? The positivists tell us the cutting edge of international lawmaking is the criminalization of ordinary war crimes, an issue that should then be the focus of international activism. Policy-oriented jurisprudence directs our attention to the real values we hope to advance, noting that living in fear of impending violence clearly deprives human beings of things they value but asking whether such a deprivation should constitute a human rights violation. Feminist jurisprudence, on the other hand, suggests the strong possibility of answering yes to that question, seeking not to minimize the horrors of human rights atrocities in both international and domestic conflict but noting that over half the world's population is more likely to experience domestic violence than "ethnic cleansing."

L&E begins from the premise that leaders are unlikely to criminalize their own potential behavior, preferring the comforting shelter of traditional doctrines of state responsibility. International legal regimes seeking actually to deter atrocities in internal conflict must thus incorporate very specific implementation provisions to create pressure on governments to create domestic institutions that could help shift the domestic balance of power. IR/IL offers additional suggestions of how to link international and domestic courts, as well as how to pick specific acts to criminalize so as to draw maximum support from NGOs and individuals operating in transnational society. Classic ILP helps us figure out what impact the Geneva Conventions and customary law have actually had on foreign-policy making; new ILP offers a theoretical foundation for allowing existing international institutions to crystallize emerging international norms. Finally, CLS helps give voice to the horrific, but deeply human, experiences of violence and injustice that cannot be captured even by the word "atrocities," much less by the clinical technicality of "violation."

In conclusion, this symposium demonstrates that as a discipline, we are better off with a multiplicity of methods. As individual scholars, we are better off understanding how to choose between them.

ANNE-MARIE SLAUGHTER AND STEVEN R. RATNER

# "CONSTITUTIONALIZATION" AND DISPUTE SETTLEMENT IN THE WTO: NATIONAL SECURITY AS AN ISSUE OF COMPETENCE

By Hannes L. Schloemann and Stefan Ohlhoff\*

## I. INTRODUCTION

The 1994 Uruguay Round revision of the dispute settlement mechanism under the General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO) has made it a forum both for traditional trade issues and for interests ranging from environmental protection to national security. The limits of GATT jurisdiction have become important issues of dispute settlement within the WTO, especially as the emergence of the WTO and its rule-based, quasi-obligatory dispute settlement system has spurred a significant shift toward legalism. Constitutional structures are developing much faster in international trade law than in any other area of international law and, in the aftermath of the Uruguay Round, are integrating ever more aspects of economic relations among states. Within the WTO regime the dispute settlement mechanism established by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) plays a prominent role in enforcing its rules and reconciling a wide array of the members' interests. The limits of the reach of the dispute settlement mechanism, given its obligatory character, are, to a certain degree, the limits of the constitutionalization<sup>1</sup> of the organization as a whole.

The WTO's dispute settlement mechanism is subject to two major potential limitations, one external and one internal. The external restriction is imposed by the reach of other international regimes,<sup>2</sup> and the internal restriction is set by the WTO members in

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<sup>1</sup>We use this term with care. In describing the new WTO system, various writers, as do we, talk about "judicialization," "legalism," "rule orientation," and the like. See, e.g., Arie Reich, *From Diplomacy to Law: The Judicialization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775 (1996-97). While this is true, the phenomenon of constitutionalization we describe, or refer to, goes beyond the development of stricter rules and formalized third-party adjudication in international trade relations. The emergence of the WTO and the experience of the past four years, in particular the overwhelming acceptance and use of the dispute settlement mechanism, have pushed the multilateral trade system to develop into a proto-supranational structure. This structure, because of its central substantive area of application as much as its highly effective mechanisms, has been charged with more and more tasks and responsibilities beyond its original scope, both by political decisions (new separate agreements) and by external pressure (the popularity of the dispute settlement mechanism). Hence the problem of competence with respect to conflicting regimes, see *infra* note 2. The WTO, unlike the GATT 1947 and most other international regimes, is thus gradually being pushed into a stronger and more and more independent third-party role within the international community as a whole. This role displays elements of a new social contract, or "constitution." For an extensive overview of the constitutionalization of the world trading system and its possible impact on other international organizations, see ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM*, esp. 44-65 (1996).

<sup>2</sup>We have treated the external limitations in some detail elsewhere. Stefan Ohlhoff & Hannes L. Schloemann, *Rational Allocation of Disputes and "Constitutionalisation": Forum Choice as an Issue of Competence*, in *DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION* 302 (James Cameron & Karen Campbell eds., 1998). Taking disputes concerning trade-related environmental measures under multilateral agreements as an example, we argue that disputes touching on different legal regimes often raise questions not only regarding the applicable substantive law, but also regarding the competent forum, which makes forum shopping a particularly acute problem under WTO dispute settlement. We show that, in the absence of a clear compatibility clause, such disputes are to be allocated for settlement to the regime that, taken as whole, most nearly covers the primary subject matter of the dispute. The principles of *lex specialis* and *lex posterior* appear applicable only in the few

reserving to themselves the right to determine which issues of national security lie outside the competence of the WTO organs. A third limitation of the WTO's juridical power may arise from the emerging problem of interpretive judicial hierarchies among national, regional and international courts.<sup>3</sup> Thus, in the *European Communities—Bananas* cases, national courts and the European Court of Justice ruled on issues that were also the subject of WTO dispute settlement fora.<sup>4</sup>

The complaint by the European Community (EC) against U.S. measures under the so-called Helms-Burton Act of 1996<sup>5</sup> has drawn attention to the internal limitations to the process of constitutionalization that can result from invoking the national security exception. Whether or not this particular dispute will ever reach a panel,<sup>6</sup> it is clear that the question of jurisdiction over security-sensitive trade disputes is considerably more important in the WTO than it was under the GATT 1947. With the establishment of the WTO, members agreed on a shift toward legalism in their trade relations with the aim of enhancing stability and predictability in the world trade order.<sup>7</sup> In doing so, all members accepted the loss of a degree of sovereignty and jurisdiction. But how much? Is there an inherent structural limitation to the reach of the WTO system even where its substantive involvement is more than arguable? Or more to the point: to what extent can the WTO

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cases where the primary subject matter does not indicate a clear choice. Furthermore, we argue that the competent forum may be forced to decline jurisdiction as a matter of judicial restraint resulting from the principle of good faith, e.g., if a party to the dispute tries to circumvent its obligations under one regime by appealing to the forum of the other. Applying these criteria, we identify the WTO as the forum that is competent to deal with most of the trade disputes touching on the subject matter of other regimes. However, we argue that the WTO must not neglect its rapidly developing constitutional function by giving in to its trade bias, that is, by neglecting interests other than trade and their legal protection by other international regimes.

<sup>3</sup> It is also endemic in antidumping law. The problem of judicial hierarchies might raise questions under public international law, such as whether the rule on exhaustion of local remedies should apply within the WTO regime, too. See Pieter Jan Kuyper, *The Law of GATT as a Special Field of International Law. Ignorance, Further Refinement or Self-contained Regime of International Law?* 25 NETH. Y.B. INT'L L. 227, 233–38 (1994); PETERSMANN, *supra* note 1, at 240–44. Petersmann also stresses other issues, such as whether national and international court procedures should be formally linked and whether they should apply the same standards of review, *id.* at 233–47.

<sup>4</sup> See *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R/USA (May 22, 1997) (panel report), WTO Doc. WT/DS27/AB/R (Sept. 9, 1997) (Appellate Body report); Case C-286/93, *Atlanta v. Council*, 4 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EuZW] 487 (1993) (Eur. Ct. Justice June 21 & July 6, 1993); Case C-280/93, *FRG v. Council*, 1994 ECR I-4973 (see also, in the same case, 4 EuZW at 483 (Order of June 29, 1993)); Case C-389/93, *Anton Dürbeck GmbH v. Bundesamt für Ernährung und Forstwirtschaft*, 1995 ECR I-1509; Case C-466/93, *Atlanta v. Bundesamt für Ernährung und Forstwirtschaft*, 1995 ECR I-3799; Case C-469/93, *Amministrazione delle Finanze dello Stato v. Chiquita Italia SpA*, 1995 ECR I-4533; Case C-68/95, *T. Port GmbH v. Bundesanstalt für Landwirtschaft und Ernährung*, 1996 ECR I-6065. See also Case T-571/93, *Lefebvre Frères et Soeurs v. Commission*, 1995 ECR II-2379 (Ct. First Instance). For some of the German decisions, see, e.g., *Bundesfinanzhof*, 7 EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT 49–51 (1996); *Verwaltungsgericht Frankfurt am Main*, 8 EuZW 182–92 (1997).

<sup>5</sup> *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, Pub. L. No. 104–114, 110 Stat. 785, reprinted in 35 ILM 357 (1996) [hereinafter Act].

<sup>6</sup> On May 18, 1998, the United States and the European Union concluded an agreement aimed at removing threats to European companies under the Helms-Burton Act. See further text at note 34 *infra*. For the agreement, see *Guide to the EU-U.S. Summit* (visited Mar. 1, 1999) (<http://europa.eu.int/s97.vts>). First, however, it is not clear whether Congress will agree to pass the amendments necessary to remove the basis for the European complaint. See FRANKFURTER ALLGEMEINE ZEITUNG, July 10, 1998, at 18. The President currently does not have the authority to grant the permanent waivers for EU nationals provided for in the EU-U.S. compromise. See, e.g., Frank Montag, *Economic Sanctions in an International Legal Context* 23 (I.B.A. Conference, Vancouver, Sept. 17, 1998). Second, the “separate peace” with the Community (and corresponding selective legislation) does nothing to relieve third countries, i.e., does not remove the possibility of further WTO involvement. Third, one does not have to be a prophet to predict that, irrespective of the Helms-Burton case, the WTO will have to face the basic question of jurisdiction sooner rather than later.

<sup>7</sup> See Antonio F. Perez, *To Judge Between the Nations: Post Cold War Transformations in National Security and Separation of Powers—Beating Nuclear Swords into Plowshares in an Imperfectly Competitive World*, 20 HASTINGS INT'L & COMP. L. REV. 331, 408–10 (1997) (in briefly touching on this development, he refers to the evolving WTO as a “constitutionalization” of the GATT).



system grant its sovereign members immunity under the national security exception in Article XXI of GATT 1994<sup>8</sup> without betraying its increasingly constitutional role, structure and character?

National security is the Achilles' heel of international law. Wherever international law is created, the issue of national security gives rise to some sort of loophole, often in the form of an explicit national security exception. The right of any nation-state to protect itself in times of serious crisis by employing otherwise unavailable means has been a bedrock feature of the international legal system. As long as the notion of sovereignty exerts power within this evolving system, national security will be an element of, as an exception to, the applicable international law.

The Helms-Burton Act provides for harsh sanctions against third parties "trafficking" in property in Cuba confiscated by Fidel Castro from American citizens (or Cubans who later became U.S. citizens). The dispute between the United States and, *inter alia*, the European Community over the Act has put the question of national security on the agenda of various international fora, including, for the first time since its formation in 1994, the WTO. Here, as in a few earlier cases under GATT 1947, the defendant state has questioned the competence of the organization's dispute settlement bodies to decide cases involving national security. The United States has invoked Article XXI of GATT 1994 not only as a justification, but also as a jurisdictional defense, challenging a WTO panel's competence on the basis of the national security exception.<sup>9</sup>

This study will analyze the merits of this claim, a claim that, if found valid, has the visible potential to cause serious irritation in the WTO system. It has been argued that permitting the invocation of a jurisdictional defense entirely or largely at the discretion of the defendant would signal the end of the WTO as a rule-based system.<sup>10</sup>

Whether—or to what extent—Article XXI of GATT 1994 provides a jurisdictional defense is distinct from, though related to, the question of its *substantive* reach. We will deal with the latter only insofar as necessary to answer the question of jurisdiction. A jurisdictional defense may be taken in two senses. If the mere invocation of the clause *ipso facto* makes the dispute inadmissible, substance is irrelevant. However, if one accepts WTO jurisdiction in principle, a dispute may still be nonjusticiable if a panel, on substantive grounds, must defer on the merits of the claim to the defendant state's government because of its exclusive interpretive authority. We will argue that no sensible interpretation of Article XXI of GATT 1994 leaves room for the first claim. We will also argue that the second claim, for substantive deference to national governments, is justified to a degree, but that it supports neither a complete nor a relevant partial jurisdictional defense. We will contend that the key to a correct assessment of the relevance of the national security exception to the WTO's jurisdiction, *i.e.*, to the allocation of decision-making power between states parties and the organization, is the distinction between the *authority to interpret* and the *authority to define*.<sup>11</sup> The first, the

<sup>8</sup>Or, where applicable, Article XIV *bis* of GATS or Article 73 of the TRIPS Agreement. For GATT 1994, the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), see FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, MARRAKESH, 15 APRIL 1994 (1994), *reprinted in* 33 ILM 1144, 1154, 1168, 1197 (1994) [hereinafter *FINAL ACT*]. Since the wording of all three provisions is identical, we refer below only to Article XXI of GATT 1994, which served as a model for the other exceptions.

<sup>9</sup>See Werner Meng, *Extraterritoriale Jurisdiktion in der US-amerikanischen Sanktionsgesetzgebung*, 8 *EuZW* 423, 426 (1997).

<sup>10</sup>As Knoll pointedly notes, "Permitting unilateral interpretation without recourse to multilateral overview . . . would allow the exception to emasculate the rules of a liberal trade order." David D. Knoll, *The Impact of Security Concerns upon International Economic Law*, 11 *SYRACUSE J. INT'L L. & COM.* 567, 587 (1984).

<sup>11</sup>One may dispute the strict validity of the terminological dichotomy we use here. Arguably, both "interpretation" and "definition" in connection with application of a legal norm are acts of interpretation in a general sense. But, regardless of the terminology, the distinction made is crucial.

authority to interpret GATT law, rests, for Article XXI of GATT 1994 as much as for any other provision, with the WTO dispute settlement bodies. However, Article XXI, for good reason, contains various open legal terms, such as "security interests," "emergency" and "necessity." We will show that, in contrast to the WTO bodies' interpretive competence, the authority to define the meaning of these terms, entirely or in part, with regard to a specific scenario (within the outer limits set by interpretation) is a necessary feature of a state's sovereignty as it stands to date, just as the United States here and other governments in past disputes have argued. In due course, we will clarify this point by differentiating the problem of definitional and/or interpretive authority regarding the national security exception from the question of deference to national governments in antidumping disputes, which essentially concerns administration and is not related to the dichotomy between interpretation and definition.

After briefly describing the parameters of the dispute provoked by the Helms-Burton Act, we will briefly survey the case law on the national security exception under GATT 1947, with special attention to the rather scant material touching on the jurisdictional question before us. We will then evaluate that question both in general and in particular along the lines sketched above. We submit that the proposed interpretation not only will help clarify the recent dispute over the Helms-Burton Act, but also may lead to a solution that can satisfy all parties (and interests) involved—and that would allow for a future development that one might call, as we do, "constitutionalization."<sup>12</sup>

This study is not aimed at resolving the question whether the Helms-Burton Act violates GATT, GATS or other international law, a debate in which numerous writers and international bodies have engaged, with varying results.<sup>13</sup> We take this dispute as an occasion for exploring, as well as an illustration of, the position of the WTO's new dispute settlement mechanism vis-à-vis this and other similar cases.

## II. HISTORICAL SKETCH: THE HELMS-BURTON ACT AND THE WTO

On March 12, 1996, following the downing of two light planes off the Cuban coast by Cuban military aircraft acting, apparently, under a standing order of the Castro Government,<sup>14</sup> President Clinton signed into law the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, better known as the "Helms-Burton Act" after its main sponsors in Congress.<sup>15</sup> The statute is the latest brick in the American embargo wall around Castro's Cuba, which was begun shortly after Fidel Castro secured power. The Act has aroused heated debate among international lawyers<sup>16</sup> and, even before its passage, triggered quick and strong opposition from some of America's closest trading partners: the European Community, Canada and Mexico.

The Helms-Burton Act is a potpourri of measures, the most controversial part being title III, which provides a basis for claims in American federal courts for civil damages against

<sup>12</sup> The position of the national security exception within GATT 1947 was examined, in particular, in an excellent and thorough study by Hahn, who touches on the jurisdictional question before us at various times. See Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558 (1991). Drawing in part on his findings, we will summarize some of the arguments so as to focus on their further development in the new context since 1990, especially as regards the end of the Uruguay Round, the emergence of the WTO, and its drive toward constitutionalization.

<sup>13</sup> See *infra* note 16; and John Spanogle, Jr., *Can Helms-Burton Be Challenged under WTO?* 27 STETSON L. REV. 1313 (1998) (with comprehensive further reference on the state of the discussion, *id.* at n.1).

<sup>14</sup> See TIME, Mar. 11, 1996, at 36 (interview with President Castro).

<sup>15</sup> Senator Jesse Helms (R, N.C.) and Congressman Dan Burton (R, Ill.).

<sup>16</sup> See, e.g., Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AJIL 419 (1996); Brice M. Clagett, *Title III of the Helms-Burton Act Is Consistent with International Law*, *id.* at 434; Brice M. Clagett, *A Reply to Professor Lowenfeld*, *id.* at 641; and the *International Symposium on the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 30 GEO. WASH. J. INT'L L. & ECON. 201 (1996-97).

anyone<sup>17</sup> who "traffics" in property confiscated by the Cuban Government from persons who are now U.S. citizens.<sup>18</sup> The civil remedy has sharp teeth: "traffickers" may be required to pay (up to) treble damages, irrespective of their link to the property and any gain they may have realized from the transaction.<sup>19</sup> As a substantial part of the real property in Cuba was nationalized at some point after the socialist revolution of 1959, and as the term "trafficking" encompasses virtually any economic activity remotely related to the confiscated property,<sup>20</sup> the law—despite its private law trappings—may amount, in result, to a secondary boycott against anyone doing business in or with Cuba.<sup>21</sup> While title III targets the "traffickers"

Provided that the court's personal jurisdiction over the defendant is established. The Act itself, it is important to note, does not change the statutory, common law, and constitutional due process requirements that must be met to obtain personal jurisdiction. However, this does little to reduce the threat to foreign individuals and companies (although it arguably leaves some room for circumvention of the Act's consequences in case of dire need), as it does not take much to fall under U.S. personal jurisdiction. Anyone doing business in America could be caught. And most European companies that are big enough to make serious investments in Cuba have some economic dealings with, thus often in, the United States, which could lead to general jurisdiction over that company, provided a certain level of activity is reached within the forum state. True, if corresponding efforts are made, large corporations can often avoid U.S. jurisdiction by outsourcing their Cuban activities or the like. But this option does not significantly change the picture. Defending the Act by pointing to the possibility of circumventing it through elaborate structural adjustments is odd and contributes little to the point. It does not explain why foreigners, even if naive enough not to resort to corporate tricks, should find themselves threatened by title III in the first place. The extraterritorial effect is perceived as real, as the U.S. trading partners' reactions demonstrate. That corresponds with the drafters' stated purposes. The House report on the bill states: "The purpose of this new civil remedy is, in part, to discourage persons and companies from engaging in commercial transactions involving confiscated property, and in so doing to deny the Cuban regime the capital generated by such ventures and deter the exploitation of property confiscated from U.S. nationals." H.R. REP. NO. 104-202, 104th Cong., pt. 1, at 39 (1995).

The involved questions of extraterritoriality and compatibility with general international law have received ample attention. See, e.g., Kathleen Adams, *Subchapter III of the Helms-Burton Act: A Reasonable Assertion of United States Extraterritorial Jurisdiction?* 21 HAMLINE L. REV. 147 (1997); Robert Muse, *A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996)*, 30 GEO. WASH. J. INT'L L. & ECON. 207 (1996-97). But neither these nor the more specific questions of the Act's substantive compatibility with WTO law are our subject here.

<sup>17</sup> Act, *supra* note 5, §302(a); see, in particular, subsection (a)(3)(C).

<sup>18</sup> Act, *supra* note 5, §302(a)(3)(C).

<sup>20</sup> *Id.*, §4(13) defines "trafficking" as follows:

a person "traffics" in confiscated property if that person knowingly and intentionally—

(i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,

(ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or

(iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person.

It remains to be seen whether courts will sanction the extensive application suggested by the text, in particular subparagraph (iii).

<sup>21</sup> This terminology, including explicit reference to the Arab boycott against those dealing with Israel, was used, e.g., by Lowenfeld, *supra* note 16, at 429; see also Joseph V. Walker, *The Legality of the Secondary Boycotts Contained in the Helms-Burton Act under International Law*, 3 DEPAUL DIG. INT'L L. 1, 2-4 (1997) (with an overview of the usually contrasting U.S. foreign and domestic policy concerning secondary boycotts). Of course, the Helms-Burton approach is somewhat different from the Arab boycott: the latter purports to prohibit certain transactions between private persons subject to the respective Arab country's jurisdiction and foreign persons that also do business with Israel, whereas title III of Helms-Burton provides a right of action for U.S. entities to target third parties on the basis of their dealings with Cuba. Nonetheless, the stated purpose, see *supra* note 17 and effective result of title III (and title IV) are to confront third parties with the choice of trading with Cuba or the United States, but not both. That is precisely what the Arab, and any other, secondary boycott does. This is not to suggest that the motivations and possible justifications for the boycotts may not be of very different moral and/or legal weight. Still, those who defend Helms-Burton on the basis of the alleged illegality of Cuban nationalizations without compensation under international law may bear in mind that the justifications for the Arab boycott—that Israel had taken Arab land contrary to international law, etc.—were not all that different in structure. Cuba itself argues that it did offer the United States compensation at the time, in the form of payments based on sugar exports, but that the offer was effectively rejected by the U.S. blockade. United

purses, title IV targets them personally: executives of corporations that "traffic" in Cuban property and their spouses, agents and minor children are to be denied entry into the United States.<sup>22</sup> Finally, title I of the Act, mostly reaffirming existing and classic embargo measures, is designed to guard against the entry into the United States of Cuban products in disguise, e.g., by barring the import of sugar from countries that are net importers of it and cannot guarantee that sugar delivered to the United States is not of Cuban origin,<sup>23</sup> and by prohibiting the entry of non-Cuban goods transported through Cuba.<sup>24</sup> The prohibition on the import of Cuban goods is extended to third-country products "made or derived" entirely or partly from Cuban goods.<sup>25</sup>

Mexico, Canada and the European Community responded with their own legislative weapons, which prohibit their affected nationals from complying with provisions of or measures taken under the Helms-Burton Act and contain "claw-back" clauses giving their nationals a right of action in their local courts to reclaim any damages paid pursuant to title III of the Act.<sup>26</sup>

The Organization of American States also reacted swiftly. At the request of its General Assembly, the Inter-American Juridical Committee issued an advisory opinion harshly critical of the Act.<sup>27</sup> The committee found it in violation of international norms regarding protection of the property rights of nationals and the extraterritorial effect of legislation.<sup>28</sup> It did not, however, analyze the consistency of the Act with international

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States—Cuban Liberty and Democratic Solidarity Act of 1996, Communication from Cuba, Mar. 19, 1996, WTO Doc. WT/L/142, at 2 (Apr. 4, 1996).

<sup>22</sup> Act, *supra* note 5, §401. So far, the U.S. administration has applied title IV in a very limited way, invoking it in only a few instances. However, panels have consistently held that the actual application of a restrictive trade measure and its impact on trade flows between parties to GATT 1947/WTO members are irrelevant, in principle, to its assessment under GATT/WTO rules. The basic rules of the trading system on restrictive trade measures, namely, Articles III and XI of GATT 1947/1994 and Articles VI, XVI and XVII of GATS, establish certain competitive conditions for trade between WTO members. Not only are these conditions distorted by the actual application of a measure. Nullification or impairment of the benefits accruing to WTO members from the establishment of a certain competitive relationship between them also results from the mere threat of restrictive measures, etc., because it leads to increased transaction costs and creates uncertainties that could affect investment plans. Thus, the provisions on restrictive trade measures are designed both to protect actual trade flows and to create the predictability needed to plan future trade. The panel report, United States—Taxes on Petroleum and Certain Imported Substances, June 17, 1987, GATT B.I.S.D. (34th Supp.) at 136, para. 5.2.2 (1988), therefore pointed out that "that objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade." See also the working party report, Brazilian Internal Taxes, June 30, 1949, 2 B.I.S.D. 181, para. 16 (1952); Japanese Measures on Imports of Leather, May 14–15, 1984, *id.* (31st Supp.) at 94, para. 55 (1985); EEC—Payments and Subsidies to Processors and Producers of Oil-Seeds and Related Animal-Feed Proteins, Jan. 25, 1990, *id.* (37th Supp.) at 86, para. 150 (1991); United States—Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, *id.* (39th Supp.) at 206, para. 5.6, 5.65 (1993).

<sup>23</sup> Act, *supra* note 5, §110(c).

<sup>24</sup> *Id.* §110(a)(2). This provision may effectively prohibit a vessel from entering a U.S. port because it is carrying goods that fall under the provision, even though the vessel intends to unload only goods that do not.

<sup>25</sup> *Id.* §110(a)(3).

<sup>26</sup> See Canada, Foreign Extraterritorial Measures Act (FEMA), R.S.C., ch. F-29 (1985), as amended Oct. 9, 1996, 1996 S.C., ch. 28, reprinted in 36 ILM 111 (1997) (esp. secs. 5, authorization of Attorney General to prohibit compliance; 7–9, claw-back); European Community, Council Regulation 2271/96 Protecting against the Effects of the Extra-territorial Application of Legislation Adopted by a Third Country (Nov. 22, 1996), 1996 O.J. (L 309) 1, reprinted in 36 ILM at 125 (esp. Arts. 5, prohibition of compliance; 6, claw-back; note that under Article 5, paragraph 2, exceptional authorization to comply with Helms-Burton may be granted where noncompliance would seriously damage the interests of the affected persons or of the Community); Mexico, Act to Protect Trade and Investment from Foreign Norms That Contravene International Law (Oct. 23, 1996), D.O., Oct. 23, 1996, at 9, translated in 36 ILM at 133 (esp. Arts. 3–5).

<sup>27</sup> OAS Doc. CJI/SO/II/doc.67/96 rev.5 (Aug. 23, 1996), reprinted in 35 ILM 1329 (1996).

<sup>28</sup> See *id.*, esp. paras. 6, 8, 35 ILM at 1332, 1333.

trade law. In addition, Mexico and Canada invoked the dispute settlement procedure of the North American Free Trade Agreement (NAFTA).<sup>29</sup>

The European Community, after fruitless consultations with the U.S. Government, submitted a formal complaint to the WTO Dispute Settlement Body on October 3, 1996, and requested the establishment of a panel.<sup>30</sup> The Community claimed that U.S. trade restrictions on goods of Cuban origin, as well as the possible refusal of visas and exclusion of non-U.S. nationals from U.S. territory, were inconsistent with United States obligations under the WTO Agreement. Violations were alleged of GATT Articles I (Most-Favoured-Nation Treatment), III (National Treatment on Internal Taxation and Regulation), V (Freedom of Transit), XI (General Elimination of Quantitative Restrictions), and XIII (Non-discriminatory Administration of Quantitative Restrictions); of GATS Articles II (Most-Favoured-Nation Treatment), III (Transparency), VI (Domestic Regulation), XVI (Market Access), and XVII (National Treatment); and of paragraphs 3 and 4 of the GATS Annex on Movement of Natural Persons Supplying Services under the Agreement. The Community also maintained that even if these U.S. measures did not violate specific provisions of the GATT or GATS, they nevertheless nullified or impaired reasonably expected benefits under GATT 1994 and GATS and impeded the attainment of the objectives of GATT 1994.<sup>31</sup>

No official response within the WTO context has been published, but statements of U.S. officials indicate that the United States intended to deny the WTO Dispute Settlement Body's authority to hear the case, claiming that it lacked competence to decide on the American invocation of the national security exception. After intensive diplomatic maneuvers, the United States and the European Union concluded a Memorandum of Understanding on April 11, 1997, in which they agreed to suspend the proceedings of the WTO panel, originally until October 15, 1997.<sup>32</sup> The suspension continued until the lapse of the panel's authority on April 22, 1998.<sup>33</sup> At a summit meeting of the Group of Eight on May 18, 1998, President Clinton, EC Commission President Santer and EC Council President Prime Minister Blair concluded an agreement aimed at removing threats to European companies under the Helms-Burton Act in exchange for a commitment to a policy of stricter international action and cooperation regarding illegal expropriations.<sup>34</sup>

### III. ALLOCATION OF COMPETENCE: AUTHORITY TO INTERPRET VS. AUTHORITY TO DEFINE

The question of the relationship between Article XXI and Article XXIII (plus the ESU) of GATT 1994 is one of interpretation.<sup>35</sup> Article XXI reads as follows:

#### *Security Exceptions*

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

<sup>29</sup> For a brief account, see Brigitte Stern, *Vers la Mondialisation juridique? Les lois Helms-Burton et Kennedy-D'Amato*, 100 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 979, 990 (1996).

<sup>30</sup> See WTO Doc. WT/DS38/2 & CORR. (1996).

<sup>31</sup> See WTO Doc. WT/DS38/2, *supra* note 30. On the present state of the dispute, see 'Overview of the State of Play of WTO Disputes' (visited Mar. 13, 1999) (<http://www.wto.org/wto/dispute/bulletin.htm>).

<sup>32</sup> Memorandum of Understanding concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, Apr. 11, 1997, EU-U.S., reprinted in 36 ILM 529 (1997), 91 AJIL 498 (1997). The Memorandum of Understanding also covered the parallel dispute over the Iran and Libya Sanctions Act of 1996. The possible international legal implications have not (yet) reached the WTO, and it is unclear whether they will. For the purpose of this study, we will confine ourselves to the dispute over Helms-Burton.

<sup>33</sup> See Overview of the State of Play of WTO Disputes, *supra* note 31.

<sup>34</sup> See note 6 *supra*; see also Stefaan Smis & Kim Van der Borgh, *The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AJIL 227, 231-36 (1999).

<sup>35</sup> See DSU, *infra* note 87, Art. 3(2); and Vienna Convention on the Law of Treaties, May 23, 1969, Arts. 31-33, 1155 UNTS 331.

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and such traffic in other goods and materials as is carried on directly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.<sup>36</sup>

One small, but important, aspect may be noted immediately. The provision, though usually referred to as "the (one) national security exception," was meant to provide a rather carefully drafted system of exceptions related to certain aspects of security, not one general security exception. Apart from subparagraph (c), which serves a separate special purpose in subordinating GATT to the primacy of UN measures under Chapter VII, subparagraphs (a) and (b) form this system, while subparagraph (b)(iii)—"other emergency"—plays the leading role as the obvious catchall provision that has been at the center of most disputes over Article XXI. We will exclude Article XXI(c) from most of our discussion, as it raises different issues.<sup>37</sup>

We first ask whether there is a direct jurisdictional defense based on Article XXI, i.e., whether the very reliance on this article by a state party makes it immune from scrutiny by a WTO dispute settlement body. If not, second, does a state's invocation of Article XXI, despite the admissibility of the dispute in principle, render it nonjusticiable, because a WTO body would have to defer interpretation of the decisive elements of the provision to the discretion of the government invoking it? The pertinent case law under GATT 1947 is the starting point for our interpretive analysis.<sup>38</sup>

<sup>36</sup> GATT 1994, *supra* note 8, Art. XXI.

<sup>37</sup> The potentially difficult questions relating to UN-ordered economic sanctions would include the competence a GATT panel could have where a state relies on UN measures, while its opponent doubts the compatibility of those measures with the UN Security Council orders they are meant to serve. A WTO panel would be competent if the question were whether and to what extent GATT obligations were disregarded *prima facie*. The criteria we have developed elsewhere, *see supra* note 2, with respect to dispute settlement mechanisms of competing international legal regimes would apply here and provide guidance. In this case the "primary subject matter" criterion would probably lead to a rather clear allocation of competence at the United Nations (especially of the Security Council and/or the International Court of Justice) regarding UN obligations and the conformity of the measures taken with them.

<sup>38</sup> While the rules of interpretation applicable to GATT 1947 have never been clear, Article 3.2 of the DSU, *infra* note 87, now requires that panels and the Appellate Body "clarify" the WTO Agreements, including GATT 1994 and GATS, "in accordance with customary rules of interpretation of public international law." The Appellate Body, in *United States—Standards for Reformulated and Conventional Gasoline*, May 20, 1996, WTO Doc. WT/DS2/AB/R, at 16–17, 20, 23, *reprinted in* 35 ILM 603 (1996) [hereinafter U.S. Gasoline], and *Japan—Taxes on Alcoholic Beverages*, Nov. 1, 1996, WTO Doc. WT/DS8, 10, 11/AB/R, at 10–15 [hereinafter Japan Alcohol], pointed out that this requirement refers, first of all, to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, *supra* note 35. In interpreting GATT 1994, GATS and other WTO Agreements, the Appellate Body therefore held that "the words of the treaty form the foundation for the interpretive process . . . . The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions." *Japan Alcohol*, *supra*, at 11–12 (citations omitted). In this respect, the Appellate Body stressed the importance of the principle of effectiveness in interpreting the WTO Agreements, *id.* at 12–13. "[I]nterpretation must give meaning and effect to all the terms of a treaty." U.S. Gasoline, *supra*, at 23. Regarding previous panel decisions under GATT 1947 and GATT 1994, as well as its own, the Appellate Body, in *Japan Alcohol*, *supra*, at 13–15, correctly took the view that such decisions do not constitute "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" in the sense of Article 31(3)(b) of the 1969 Vienna Convention. However, "[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO

### *The Article XXI Cases under GATT 1947*

The national security exception has produced rather limited case law during its first fifty years. This might seem surprising at first, but it is not. National security, it seems, is not a problem nations like to submit to international scrutiny, especially in the context of a "mere" trade organization. Only four such cases can be said to have reached the level of formalized dispute settlement<sup>39</sup> under Article XXIII of GATT 1947: *Czechoslovakia v. United States* in 1949, *Nicaragua v. United States* in 1984 (*Nicaragua I*), *Nicaragua v. United States* in 1985–1986 (*Nicaragua II*), and *Yugoslavia v. European Community* in 1991–1992. In a handful of other instances, disputes involving national security arose but did not lead to an (attempted) application of formal dispute settlement under Article XXIII.

The *Czechoslovak* case originated in 1949, when the United States, through a system of export licenses, imposed a ban on the export of certain products to Czechoslovakia. Czechoslovakia, in turn, resorted to dispute settlement under Article XXIII and the United States invoked, inter alia, Article XXI. The CONTRACTING PARTIES eventually rejected the Czechoslovak complaint almost unanimously, apparently taking their cue from the United States and its allies, in particular Canada and the United Kingdom, to the effect that, in the words of the British delegate, "every country must have the last resort relating to its own security."<sup>40</sup> Nevertheless, the CONTRACTING PARTIES finally did take a decision on the Czechoslovak complaint under Article XXIII(2). The chairman had explicitly asked them to do so, primarily in view of the U.S. justification based on Articles XXII and XXI and "particularly on the ground of security covered by the latter."<sup>41</sup> The CONTRACTING PARTIES laconically "decided to reject the contention of the Czechoslovak delegation that the Government of the United States had failed to carry out its obligations under the Agreement through its administration of the issue of export licences."<sup>42</sup> Thus, despite their deference to the U.S. Government on substantive grounds, the CONTRACTING PARTIES did not altogether decline their (formal) Article XXIII jurisdiction over matters involving Article XXI.<sup>43</sup>

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Members, and, therefore, should be taken into account where they are relevant to any dispute." Furthermore, the Appellate Body stated that "a panel could . . . find useful guidance in the reasoning of an *unadopted* panel report that it considered to be relevant," *id.* at 15 (emphasis added). Hence, we consider it useful to analyze past panel practice regarding Article XXI of GATT 1947 before engaging in "classic" treaty interpretation.

<sup>39</sup> The distinction among cases made here is arguably somewhat arbitrary. It is meant to serve the sole purpose of illuminating the specific jurisdictional question before us.

<sup>40</sup> UK Representative Shackle at the CONTRACTING PARTIES' final meeting on the dispute, Doc. GATT/CP.3/SR.22, at 7 (1949).

<sup>41</sup> Doc. GATT/CP.3/SR.22, *supra* note 40, at 8–9.

<sup>42</sup> The decision of June 8, 1949, 2 GATT B.I.S.D. 28 (1952), was taken after a brief discussion, without prior reference to a working party. Like all such decisions in the early GATT days, it was not accompanied by official reasons. The delegates' statements during the discussion thus provide the only, very limited indication of the underlying reasons and motivations.

<sup>43</sup> Bhala takes this decision, together with the 1982 decision in the Falkland/Malvinas context, *see* text at note 80 *infra*, as sufficient precedent for the conclusion that formal GATT/WTO jurisdiction under Article XXIII for matters involving Article XXI cannot be questioned. Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L ECON. L. 263, 278, 279 (1998). However, we believe that the significance of the mere fact of this decision to the question of jurisdiction is limited. At that time the plenum of the CONTRACTING PARTIES conceived of itself in only a rudimentary way as a judicial or (in an strict sense) law-applying body under Article XXIII of GATT 1947. Even the later, and arguably still more diplomatic than judicial, GATT 1947 panel system was barely on the horizon in the form of the emergent working parties. *See* ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 75–83 (2d ed. 1997). That the rejection of the Czechoslovak complaint was seen as a (positive) assumption of "jurisdiction" regarding Article XXI in any technical sense therefore seems debatable. Moreover, some of the votes, as the statement by the Pakistani representative reveals, were apparently based on the alleged lack of substantiation of the Czechoslovak complaint, i.e., on purely procedural grounds, thus avoiding the jurisdictional question regarding Article XXI altogether. *See* the discussion in Doc. GATT/CP.3/SR.22, *supra* note 40.

Although the apparent diversity of motivations and views<sup>44</sup> makes a clear assessment of the decision difficult, three points are worth noting: First, Michael Hahn observes that it is remarkable that, barely two years after the drafting of the GATT, the contracting parties, in their discussion, mostly referred to Article XXI in general terms.<sup>45</sup> Little mention was made of the elaborate structure of the requirements set forth in the article.<sup>46</sup> Apparently, some considered invocation of the general term "security (interest)" sufficient to provide justification under Article XXI—an approach that might be termed extratextual, if not contra-textual,<sup>47</sup> and as such rather difficult to qualify as an act of *legal* interpretation.<sup>48</sup>

Second, the debate on the decision strongly reflects the context of the beginning Cold War and the fear that it could disrupt the GATT.<sup>49</sup> As the British delegate put it, "the CONTRACTING PARTIES should be cautious not to take any step which might have the effect of undermining the General Agreement."<sup>50</sup> The central concern in "interpreting" the GATT in this situation was the equilibrium of the world trading system as a whole, as established by the GATT. Such a teleological and systematic (or contextual) approach<sup>51</sup> should reflect changes occurring within the world trading system or changes in the role that system plays in a larger context.

Third, when Czechoslovakia alleged that the U.S. construction of the term "war material" in Article XXI(b) (ii) was overly expansive, covering almost everything, the U.S. delegate replied that, as only two hundred out of three thousand different group items fell under the "highly selective"<sup>52</sup> U.S. export control regime (i.e., were regarded as security-sensitive), the allegation was without merit.<sup>53</sup> This was a virtual defense *on the merits* of the invocation of national security under Article XXI.<sup>54</sup>

*Nicaragua I* was triggered in 1983, when the United States, pursuant to the Reagan administration's Central American policy, drastically reduced the share of sugar imports allocated to Nicaragua. A panel was formed under Article XXIII of GATT 1947. According to its 1984 report, "The United States stated that it was neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms . . . [and that t]he action of the United States did of course affect trade, but was not taken for trade policy reasons."<sup>55</sup> Consequently, the panel did

<sup>44</sup> See Doc. GATT/CP.3/SR.22, *supra* note 40.

<sup>45</sup> Hahn, *supra* note 12, at 570.

<sup>46</sup> In vain did the Czechoslovak delegate point to his recollection of the understanding at the Havana Conference two years earlier that Article XXI was to be interpreted narrowly. See his initial statement in Doc. GATT/CP.3/39 (1949). He tried to draw the CONTRACTING PARTIES' attention to the terms of Article XXI(b) (ii) ("war material"), but succeeded only in provoking a rejection by the defendant United States, see text at note 52 *infra*, while the other contracting parties apparently took no part in the substantive discussion.

<sup>47</sup> See Hahn, *supra* note 12, at 570.

<sup>48</sup> As HUDEC, *supra* note 43, at 77, points out: "although the Czech complaint was not frivolous, the infant GATT had neither the capacity nor the prestige to undertake a serious examination of U.S. cold war measures." Note again the statement of the Pakistani delegate, *supra* note 43.

<sup>49</sup> HUDEC, *supra* note 43, at 77.

<sup>50</sup> UK delegate Shackle, Doc. GATT/CP.3/SR.22, *supra* note 40, at 7.

<sup>51</sup> Teleological in that it has the limited, or focused trade purpose of the infant GATT in mind; systematic/contextual in that it is based on the structure of the GATT as a system.

<sup>52</sup> See Reply by the Vice Chairman of the U.S. Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 on the Agenda, Doc. GATT/CP.3/38, at 11 (1949).

<sup>53</sup> Statement of Mr. Evans, Doc. GATT/CP.3/SR.22, *supra* note 40, at 7–8.

<sup>54</sup> Arguably, this interpretation of the U.S. argument is somewhat broad in view of the limited legal "density" of the discussion. Nonetheless, the contrast to *Nicaragua I*, see text at notes 55–56 *infra*, remains: there, the United States refused even to discuss Article XXI. Here, it let itself be dragged, a few steps at least, into a discussion over the requirements of Article XXI(b).

<sup>55</sup> United States—Imports of Sugar from Nicaragua, Mar. 13, 1984, GATT B.I.S.D. (31st Supp.) at 67, 72, para. 3.10 (1985). The United States refused to offer any defense. It neither argued against the allegation of having disregarded obligations under Article XIII of GATT 1947 nor invoked Article XXI, but generally stated



not examine whether the actions could be justified under the security exception and, instead, found the United States in violation of Article XIII(2).<sup>56</sup> Here, the United States effectively maintained a consistent jurisdictional defense. It barred any decision on national security by (expressly) not invoking Article XXI, but it also did not block the establishment and proceedings of the panel or the adoption of the report. At the same time, the United States did not accede to the panel's suggestion that it reallocate its appropriate quota to Nicaragua.

In 1985 the U.S. policy vis-à-vis Sandinista Nicaragua of imposing a complete import and export embargo<sup>57</sup> led to another dispute over trade measures employed for non-economic purposes (*Nicaragua II*). The President expressly based the measure on the "unusual and extraordinary threat to the national security and foreign policy of the United States" and went so far as to "declare a national emergency to deal with that threat."<sup>58</sup> Again, Nicaragua requested the establishment of a panel.<sup>59</sup>

This time, the United States changed its strategy and pressed the GATT Council to adopt terms of reference that would direct the panel "[t]o examine, in the light of the relevant GATT provisions, [and] the understanding reached at the Council . . . that the Panel cannot examine or judge the validity of or motivation for the invocation of Article XXI:(b) (iii) by the United States, . . . the measures taken by the United States."<sup>60</sup> The question of national security, in other words, was simply excluded by the restrictive terms of reference.

Ironically, this strategy could be interpreted as a (positive) shift in the American view.<sup>61</sup> Even though it was only by way of an "understanding," the United States was eager

that its action was "fully justified in the context in which it was taken." *Id.* at 72, para. 3.11. Only with regard to the alleged violation of Article XI (General Elimination of Quantitative Restrictions) did the United States, while again maintaining that it did not intend to respond to Nicaragua's arguments, state its general position that the U.S. quota system was consistent with GATT. *See id.* at 73, para. 3.12.

<sup>55</sup> *See id.*, paras. 4.4, 4.5. Since Article XXI was excluded because it had not been invoked, the panel's reasoning accorded with the normal practice with regard to the Article XIII obligation of "nondiscriminatory administration of quantitative restrictions": that the reduction in the sugar quota was not warranted by corresponding market changes in the preceding years, *see* Art. XIII(2). With regard to Article XXI, the panel found that the question did not fall within its terms of reference.

<sup>56</sup> *See* Executive Order No. 12,513, May 1, 1985, 50 Fed. Reg. 18,629 (May 2, 1985).

<sup>57</sup> *Id.*

<sup>58</sup> Owing to Nicaragua's opposition, the panel report was never adopted. The United States lifted its embargo in 1990 after the Sandinistas lost power at the polls.

<sup>59</sup> GATT Doc. C/M/196, at 7 (1986).

<sup>60</sup> The documented parts of the discussion leading to the understanding, *see* GATT Docs. C/M/191, C/M/192, C/M/196 (1986), are arguably inconclusive on this question. While most countries both supported Nicaragua's right (originally contested by the United States) to have a panel established and did not see any reason to exclude the Article XXI justification from its review, a few members, notably Canada and the European Community, agreed in principle with the U.S. position that the political question should not be subjected to panel scrutiny. The discussions, similarly to those in the *U.S.-Czechoslovak* case discussed above, primarily reflect a certain anxiousness to avoid disruptive confrontation within GATT as much as possible. *See, e.g.,* the statement of the representative of Japan who, while recognizing that the matter was "essentially political," supported Nicaragua in principle regarding the right to request panel review; nevertheless, "from a practical point of view, Japan doubted whether this would be an efficient means of finding a solution in the present case." GATT Doc. C/M/191, *supra*, at 43. It is difficult, if not problematic, to extract legal conclusions from those primarily diplomatic statements, as with most CONTRACTING PARTIES' discussions under the old GATT 1947. Nonetheless, it seems safe to conclude that the decision on the terms of reference did not reflect a consensus that a panel would automatically be barred from reviewing invocations of Article XXI but represented the lowest common denominator, or the conditions under which the United States would agree to the establishment of a panel. Because a consensus was necessary under GATT 1947, the United States blocked that consensus until it got its way. Thus, this consensus did not constitute a common position or interpretation of GATT but an ad hoc agreed-upon limitation of review.

Significantly, the U.S. strategy in this case is no longer possible under the WTO DSU, which does not require the consent of the defendant party for the establishment of a panel (DSU Art. 6(1)) and provides for all-inclusive standard terms of reference (DSU Art. 7), which apply if the parties do not agree otherwise. This shift from power (or diplomacy) orientation to rule orientation limits such strategies technically and also, we argue, bears strongly on the interpretation of the underlying legal concepts.

to explicitly prevent a panel from ruling on the merits of the invocation of Article XXI of GATT 1947. That it felt it had to do so to secure jurisdictional immunity regarding national security in this case may shed some light on the strength, or rather weakness, of the jurisdictional defense claim based on a "naked" Article XXI.<sup>62</sup>

The panel still managed to pronounce itself on the question, albeit implicitly. It made clear that, contrary to the argument advanced by the United States during the proceedings, it did not find itself limited by a general lack of competence regarding Article XXI or by the nonjusticiability of that provision but, rather, by its particular mandate:

The panel concluded that, as it was not authorized to examine the justification for the United States' invocation of a general exception to the obligations under the General Agreement, it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement.<sup>63</sup>

The panel then took the unusual step of formulating "more general questions" raised by the dispute and the proceedings, in particular the limitation of its mandate and, consequently, its findings:

If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the CONTRACTING PARTIES ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision? If the CONTRACTING PARTIES give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that provision, do they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2?<sup>64</sup>

Thus, the panel acknowledged that the national security exception, like any other international treaty provision, must be interpreted in conjunction with the other provisions of the same treaty. As Hahn points out, it is striking that this basic and obvious principle of interpretation, which is firmly established in both national and international<sup>65</sup> law, required so much effort to be spelled out.<sup>66</sup> But this rule considerably weakens one argument of those who see a jurisdictional defense in Article XXI of the GATT, i.e., that it is a mere reflection<sup>67</sup> of an extraneous limitation on the General Agreement and its power to convey adjudicatory competence. This argument is often brought forward in (unnecessary) conjunction with the now dubious<sup>68</sup> dogma of the GATT's being a "hermetically sealed system" limited to trade and commerce and independent of other international law.<sup>69</sup>

<sup>62</sup> Note, however, that during the proceedings the United States tried to avoid any such conclusion by maintaining that the panel was barred from examining the invocation of Article XXI(b) (iii) both by the "clear terms" of that provision and by the terms of reference. United States—Trade Measures Affecting Nicaragua, Oct. 13, 1986 (unadopted), GATT Doc. L/6053, para. 4.6 (restricted). The panel refused to provide assistance by stretching the interpretation of the restriction in the terms of reference to the other extreme: "The panel did not consider the question of whether the terms of Article XXI precluded it from examining the validity of the United States' invocation of that Article as this examination was precluded by its mandate." *Id.*, para. 5.3.

<sup>63</sup> *Id.*, paras. 5.2, 5.3 (containing quote in text); see also Hahn, *supra* note 12, at 609.

<sup>64</sup> *Id.*, para. 5.17.

<sup>65</sup> See Rudolf Bernhardt, *Interpretation in International Law*, in [Instalment] 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 318 (Rudolf Bernhardt ed., 1984).

<sup>66</sup> See Hahn, *supra* note 12, at 577.

<sup>67</sup> See the EC statement in the Council discussions on the EC measures against Argentina, GATT Doc. L/5319/Rev.1 (1982), quoted in GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 603 n.25 (6th rev. ed. 1995).

<sup>68</sup> See U.S. Gasoline, *supra* note 38, at 17: "That direction [i.e., DSU Art. 3(2)] reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."

<sup>69</sup> It was, among others, this very GATT panel which expressed this (old) view: replying to Nicaragua's reference to principles of general international law, it stated, "without refuting such argumentation," that its

In the most recent case, in November 1991, the European Community restricted trade with the states of the former Socialist Federal Republic of Yugoslavia in view of the civil war there, explicitly grounding this decision in Article XXI.<sup>70</sup> Yugoslavia invoked the GATT dispute settlement mechanism, claiming that the requirements of neither Article XXI(b) nor (c) were met.<sup>71</sup> The Council agreed to establish a panel—notably, for our purposes, without any claims by the Community that panel review of its decision was barred per se. However, because of uncertainty about the status of the new Federal Republic of Yugoslavia (Serbia and Montenegro) as a party, the proceedings were suspended by a Council decision of June 1993.

Apart from these four disputes, two other instances in which national security played a role are worth brief mention here.<sup>72</sup> In 1961, upon the accession of Portugal to the General Agreement, Ghana justified its restrictions on trade with the new contracting party by reference to Article XXI, largely following the expansive approach to the interpretive authority of the member states regarding the national security exception adopted by the CONTRACTING PARTIES twelve years earlier in the U.S. dispute with Czechoslovakia.<sup>73</sup> However, in contrast to the United States in that dispute, Ghana explicitly tried to defend itself on the merits<sup>74</sup> by bringing its actions under the objective prerequisites of Article XXI, namely, the requirements of paragraph (b) (introductory sentence) and its subparagraph (iii).<sup>75</sup> However, the question of jurisdiction as such was not raised in this instance.

In 1982, after the attempted annexation of the Falkland/Malvinas Islands by Argentina, the European Community, Australia and Canada imposed restrictions on trade with Argentina. In the ensuing discussions in the GATT Council, the Community, its member states, and Canada and Australia stressed that “they had taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement was a reflection.”<sup>76</sup> This reliance on unspecified inherent rights rather than on Article XXI

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terms of reference—“to examine [the measures] in the light of the relevant GATT provisions”—prevented it from taking non-GATT legal rules into account. United States—Trade Measures Affecting Nicaragua, *supra* note 62, para. 5.15. See Hahn, *supra* note 12, at 610 for further references.

<sup>70</sup> GATT Doc. L/6948 (1991), quoted in GATT, ANALYTICAL INDEX, *supra* note 67, at 604.

<sup>71</sup> GATT Doc. DS27/2, at 2, Feb. 10, 1992. The Yugoslav complaint, directed only against the Community, did not mention embargo measures adopted by other parties, like the more extensive action taken by the United States, in this context.

<sup>72</sup> As with the cases discussed above, the short introduction is meant to give an overview; key aspects will be taken up again where they figure in the argument.

<sup>73</sup> See text at notes 40–54 *supra*. Ghana expressly relied on the statement that “[i]t should be noted that under . . . Article [XXI] each Contracting Party was the sole judge of what was necessary in its essential security interests.” GATT Doc. SR.19/12, at 196 (1961).

<sup>74</sup> This is not to say that the U.S. actions in that case or in others, e.g., under the Trading with the Enemy Act (China, North Korea) or the International Emergency Economic Powers Act (Iran, Iraq, Libya, Nicaragua, Sudan), are any less reasoned. The Acts require the administration to find “an unusual and extraordinary threat” in order to justify restrictive measures. Nevertheless, it is crucial to the analysis before us to bear in mind that those are requirements under U.S. law. Although they may substantively correspond to (or even go beyond) the requirements of Article XXI of GATT et al., fulfilling the internal procedures and requirements does not relieve a state from providing justification under the rules of international law where applicable. One has to be able and willing to show one’s entitlement when one claims an exception. Whether this general rule in law-based systems applies to states taking measures under Article XXI of GATT 1994 is what we are discussing here.

<sup>75</sup> Ghana stated that the policy of Portugal vis-à-vis its African territories, namely Angola, permanently threatened stability in the region, and thus constituted an emergency in international relations under Article XXI(b) (iii). Ghana stressed that a country’s security could be undermined by a potential, as well as by an actual, danger. Pressure on the Portuguese Government, it said, might reduce the danger to Ghana and was therefore justified under Article XXI(b) (iii). See GATT Doc. SR.19/12, *supra* note 73, at 196.

<sup>76</sup> GATT Council, Minutes of Meeting held on May 7, 1982, GATT Doc. C/M/157, at 10 (June 22, 1982); see also Trade Restrictions Affecting Argentina Applied for Non-economic Reasons, GATT Doc. L/5319/Rev.1 (Mar. 5, 1982). For an overview of the discussion, see Michael Gaugh, *GATT Article XXI and U.S. Export Controls: The Invalidity of Nonessential Non-Proliferation Controls*, 8 N.Y. INT’L L. REV. 51, 68–69 (1995).

itself shows a striking reluctance both to found the claim of the legality of trade measures taken for noneconomic purposes on the GATT<sup>77</sup> and to submit the question of legality to the scrutiny of a GATT forum.<sup>78</sup>

This extreme position was not accepted by the CONTRACTING PARTIES. Like many others, Brazil's delegate opposed and warned against the *carte blanche* that acceptance of this position would grant and demanded substantiation of the claim under the requirements of Article XXI. However, he went on to agree with the Community that the *definition* of essential security interests, as a matter of principle, was to be provided by the state invoking them.<sup>79</sup> This distinction, in our view, carries the key to the solution of the question before us.

The discussions avoided establishing a panel but led to a "Decision concerning Article XXI of the General Agreement," which read, in relevant part, as follows:

*Considering* that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved;

*Noting* that recourse to Article XXI could . . . affect benefits accruing to contracting parties under the General Agreement;

*Recognizing* that . . . until such time as the CONTRACTING PARTIES may decide to make a formal interpretation of Article XXI it is appropriate to set procedural guidelines for its application;

The CONTRACTING PARTIES *decide* that:

1. Subject to the exception in Article XXI:*a*, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.

2. When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.<sup>80</sup>

This decision, as Hahn puts it, "left almost everything as obscure as it was before."<sup>81</sup> The document is characterized by its terms as a provisional guideline only. Paragraph 1 of the preamble simply repeats the formula of Article XXI(a) and (b). Thus, it does not create a new vacuum to be filled by the discretionary powers of the state parties. However, it also does not offer additional guidance. The generic reference to cases in which "reasons of security are involved" does not dilute the requirements of Article XXI, but simply highlights the obvious general function of the provision to provide a legal escape in cases of necessity. While it does not indicate which, if any, objective standards might apply to the parties' "considering" that reasons of security are involved, this does not mean complete deference to national discretion, for the next

<sup>77</sup> See Hahn, *supra* note 12, at 573.

<sup>78</sup> The European Community, the United States and Canada repeatedly stressed their view that GATT was not an appropriate forum in which to discuss the justification of the measures. See GATT Council, *supra* note 76; and GATT Council, Minutes of Meeting held on June 29–30, 1982, GATT Doc. C/M/159 (Aug. 10, 1982). To avoid misunderstanding, we note again that the questions of the applicable law and the appropriate forum do not necessarily demand parallel answers.

<sup>79</sup> The representative of Brazil "agreed that each contracting party had the right to define its essential security interests, but he felt that some justification should in fact be given when it was apparent that no essential security interests were involved." GATT Council, *supra* note 76, at 12. The EC delegate, relying generally on "inherent rights," see text at note 76 *supra*, had not made that distinction, and it was not specifically referred to by other delegates. Thus, this distinction does not have precedential value in a technical sense, but it exposes, in our view, the crucial aspect of the interpretive problem under consideration.

<sup>80</sup> GATT Doc. L/5426 (1982), GATT B.I.S.D. (29th Supp.) at 23 (1983).

<sup>81</sup> Hahn, *supra* note 12, at 575.

paragraph of the preamble corresponds to Article XXIII of the GATT—the basis of the Agreement's dispute settlement mechanism.

Thus, the cases do not furnish a clear answer to the question of GATT/WTO competence regarding the national security exception of Article XXI of GATT 1947/1994. Aside from the fact that they are limited in number and scope, they all predate the establishment of the WTO.

# Article XXI of GATT 1994 as a Direct Jurisdictional Defense?

Does the invocation of Article XXI per se bar WTO panel review? In the discussions over the Helms-Burton Act, the United States, as it and others had done before, stressed the general view that the WTO is not an appropriate forum for questions of national security. In *Nicaragua I*, as mentioned, the United States did not invoke Article XXI in the proceedings, thereby effectively separating the national security exception from the rest of GATT law. The result was somewhat strange, but logical: the United States was held to be in violation of GATT 1947 but did not feel compelled to comply. The United States apparently had no objection to the perception that it was violating GATT 1947, as it saw it as a system limited to trade law. It did not view the national security exception as part of that system, but somehow as a separate legal realm. The European Community in the *Falkland/Malvinas* dispute in 1982 took a similar approach in justifying its actions by reference to undifferentiated "inherent rights" of which Article XXI was only a "reflection."

The text of Article XXI does not call directly for an a priori denial of competence to a GATT/WTO panel regarding cases involving the application of that article. It is structurally a limited and conditional exception to the GATT's substantive rules, as can be inferred from its heading ("Security Exceptions"), as well as from the words in its chapeau ("[n]othing in this Agreement shall be construed").<sup>82</sup> The world trade system as established by the GATT/WTO is a system in which the key rules, in particular Articles I, II, and XI, are mainly based on reciprocity, which presupposes general application. Hence, a balance must be struck between the right of a member to invoke an exception under the WTO Agreements based on legitimate policy interests, on the one hand, and the substantive rights of the other members under those agreements, on the other hand. In its recent report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body pointed out:

To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in doing so, negates altogether the treaty rights of other Members.<sup>83</sup>

Within Article XX, on general exceptions, the chapeau establishes the balance between the right of a member to invoke the exception and its duty to respect the substantive

<sup>82</sup> See *United States—Section 337 of the Tariff Act of 1930*, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345, para. 5.9 (1990) [hereinafter U.S. Tariff Act], on the identical language in Article XX of GATT 1947. See also *United States—Restrictions on Imports of Tuna* (unadopted), GATT B.I.S.D. (39th Supp.) at 155, para. 5.22 (1993) [hereinafter U.S. Tuna I]; *U.S. Gasoline*, *supra* note 38, at 22–23; *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, May 23, 1997, WTO Doc. WT/DS33/AB/R, at 16–17; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Nov. 6, 1998, WTO Doc. WT/DS58/AB/R, para. 157, reprinted in 38 ILM 118 (1999) [hereinafter U.S. Shrimp].

<sup>83</sup> U.S. Shrimp, *supra* note 82, para. 156.

rights of the other members.<sup>84</sup> On the same grounds, an interpretation of Article XXI "in the light of [the WTO Agreements'] object and purpose"<sup>85</sup> also requires a balanced approach, which does not support a direct and, thus, complete jurisdictional defense.<sup>86</sup>

Moreover, we note that the DSU itself is not subject to a national security exception. To the contrary, its Article 23 requires members, "[w]hen [they] seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, [to] have recourse to, and abide by, the rules and procedures" of the DSU.<sup>87</sup> In particular, members shall not have recourse to any other dispute settlement mechanism to resolve trade disputes between them. The purpose of this provision, which follows from its heading, is the "strengthening of the multilateral system." It is for the same purpose that the new dispute settlement system now subjects the most important decisions in the proceeding, most notably those on the establishment of panels,<sup>88</sup> on the adoption of panel and Appellate Body reports,<sup>89</sup> and on compensation and suspension of concessions,<sup>90</sup> to a so-called negative consensus.<sup>91</sup> If members were able to circumvent the application of the DSU by merely invoking the national security exceptions of GATT 1994, GATS or the TRIPS Agreement, this purpose of strengthening the system could not be achieved. Such a direct jurisdictional defense would transform a primarily substantive national security exception into a procedural national security exception, and thus would

<sup>84</sup> *Id.*; U.S. Gasoline, *supra* note 38, at 22. Past practice also shows that panels have consistently applied the GATT's exceptions, in particular Article XX, in such a way as not to frustrate its substantive rules. In particular, they have required contracting parties, where a *prima facie* violation of GATT principles has been established, to justify restrictive measures taken by them under an exception and to carry the burden of proof that the measure indeed comes under the exception. See Canada—Administration of the Foreign Investment Review Act, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 140, para. 5.20 (1984); U.S. Tariff Act, *supra* note 82, para. 5.27. In this connection, one panel pointed out that the "practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation, and not to examine Article XX exceptions unless invoked." U.S. Tuna I, *supra* note 82, para. 5.22. Recently, however, the Appellate Body correctly stated:

merely characterizing a treaty provision as an "exception" does not itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in the context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.

EC—Measures Concerning Meat and Meat Products (Hormones), Feb. 13, 1998, WTO Doc. WT/DS26,48/AB/R, para. 104 [hereinafter EC Meat Products]. The Appellate Body therefore overruled the panel and held that Article 3.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) does not constitute an exception to Article 3.1 of the same Agreement, *id.*, paras. 169–72, and has to be treated differently "from the relationship between, for instance, Articles I or III and Article XX of the GATT 1994," *id.*, para. 104. However, this wording, in particular the reference to Article XX, also suggests that, if a provision clearly constitutes an exception—as do Articles XX and XXI—the Appellate Body still believes that the purpose of the treaty would be jeopardized if that exception were interpreted and applied without taking into account the necessary balance between the GATT's exceptions and substantive rights. The Appellate Body requires only that panels thoroughly examine the relationships among the various provisions they apply to a particular dispute.

<sup>85</sup> Vienna Convention on the Law of Treaties, *supra* note 35, Art. 31(1).

<sup>86</sup> In U.S. Shrimp, *supra* note 82, the Appellate Body pointed out that the need to strike a balance between the right to invoke an exception and the substantive rights under GATT derives not only from the chapeau of Article XX, but also from general principles of international law. In its view, the chapeau of Article XX "is, in fact, but one expression of the principle of good faith." *Id.*, para. 158.

<sup>87</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 23(1), in FINAL ACT, *supra* note 8, reprinted in 33 ILM at 1226.

<sup>88</sup> *Id.*, Art. 6(1).

<sup>89</sup> *Id.*, Arts. 16(4) and 17(14), respectively.

<sup>90</sup> *Id.*, Art. 22(6) and (7).

<sup>91</sup> I.e., the DSU, as opposed to the practice under the relevant understandings and decisions within the framework of GATT 1947, requires a consensus of the Dispute Settlement Body not to establish a panel, not to adopt a panel or Appellate Body report, etc.

empower members to block dispute settlement proceedings within the WTO. This result would directly contradict the purpose of "strengthening the multilateral system" and the carefully established negative-consensus process.

Similarly, a contextual view does not provide any support for a different answer. Structurally, Article XXI is firmly embedded in the system of rules and exceptions and is positioned precisely between the other exceptions (Art. XX) and the dispute settlement provisions (Arts. XXII and XXIII). In view of the context, invocations of Article XXI cannot be treated any differently from invocations of Article XX.<sup>92</sup>

The *travaux préparatoires* equally lend no support to differentiation with regard to the jurisdictional question. The drafting history of Article XXI and its predecessors<sup>93</sup> leaves little doubt that there were two basic understandings among the drafters. On the one hand, the exception for politically motivated trade measures in situations of national necessity needed to be broad. It was successively widened during the deliberations, reflecting the zeitgeist at the time of drafting.<sup>94</sup> The still-fresh memories of the war and the beginning of the Cold War hardly predisposed a country to give up what were perceived as essential sovereign rights in exchange for economic liberalization.<sup>95</sup> The organization to be founded was to be limited in scope to economic questions: it was to be a system for dealing with the technical task of canonizing, canalizing and controlling reciprocal trade liberalization. This very limitation may have made the functioning of the GATT possible in the first place. This limitation, on the other hand, in no way affected the understanding that the application of the security exception, with its potential for abuse, was to be subject to review under the normal dispute settlement procedure.<sup>96</sup> The U.S. Tariff Commission, among others, clearly shared this view.<sup>97</sup>

<sup>92</sup> The importance of the position of Article XXI between Article XX on general exceptions and the dispute settlement provisions in Articles XXII and XXIII is further highlighted by the legislative history of the national security exceptions. At the outset of the negotiations on the establishment of an International Trade Organization, the suggested Charter, as proposed by the United States in 1946, as well as the first draft prepared by the Preparatory Committee in London in October and November of 1946 and the draft prepared by a technical drafting committee in New York in January and February of 1947, provided for national security exceptions only as part of the general exceptions to the chapters on commercial policy and commodity agreements. See, respectively, U.S. DEP'T OF STATE, PUB. NO. 2598, SUGGESTED CHARTER FOR THE INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS, Arts. 32, 49 (Commercial Policy Series 93, 1946); London and New York Draft Charters, Arts. 37, 59, cited in GATT, ANALYTICAL INDEX, *supra* note 67, at 608. Only at the meeting of the Preparatory Committee in Geneva from April to October 1947 was it decided to transfer the security exceptions from the general exceptions to a separate article at the end of the Charter, which was practically identical with the present text of GATT Article XXI. See Geneva Draft Charter, Art. 94, cited in GATT, ANALYTICAL INDEX, *supra*, at 608. This transfer raised concerns at the Geneva meeting about the applicability of the dispute settlement mechanism to the security exception because these provisions were located at a substantial remove in article 35 of the New York Draft Charter. However, it was generally agreed that this removal would not affect the application of the dispute settlement mechanism regarding the new article (see text at notes 93-98 *infra*). Thus, the contracting parties of GATT 1947 were well aware of the arguments that might be derived from the position of the security exception in the General Agreement and intended to remedy any doubts about the reach of Article XXI by placing it between the general exceptions and the dispute settlement provisions.

<sup>93</sup> In particular, Article 94 of the Geneva Draft Charter, *supra* note 92.

<sup>94</sup> See, e.g., WILLIAM ADAMS BROWN, THE UNITED STATES AND THE RESTORATION OF WORLD TRADE: AN ANALYSIS AND APPRAISAL OF THE I.T.O. CHARTER AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE, esp. 351-52 (1950).

<sup>95</sup> See, e.g., the statement by U.S. delegate Evans in the *Czechoslovak* dispute: "And I believe that most of the delegates present will feel greater security for their own future because the United States is, in fact, making use of these exceptions." Doc. GATT/CP.3/38, *supra* note 52, at 4.

<sup>96</sup> See the verbatim reports of Commission A of the Preparatory Committee at its Geneva meeting, Doc. EFACT/A/PV/33, at 26-29, quoted in GATT, ANALYTICAL INDEX, *supra* note 67, at 705. For additional details, see Hahn, *supra* note 12, at 565-69.

<sup>97</sup> The Commission stated:

This article contains no provisions requiring members to obtain the approval of the Organization for any action they take or refuse to take under these exceptions, although it appears likely that charges that the exceptions were being abused for protective or other purposes would require consultation under Article 89 and decision by the Organization under Article 90 if the consultation should not result in satisfactory settlement.

During the deliberations some advanced the thesis that the only safeguard against abuse of the national security provisions lay in the spirit in which they were to be applied.<sup>98</sup> This was surely true then and, to a degree, is now; but only insofar as the system and its participants understand it as a power-based order. Insofar as the system is understood as a system of rules (and only within such a system does the question of quasi-judicial competence make some sense), this "spirit" remains important but is still reviewable—at least on the level of a good faith test. We will return to this point in due course.

Article 1 of the new WTO Dispute Settlement Understanding provides further argument against a direct jurisdictional defense. Article 1, on "coverage and application" of the DSU, states as a general rule that the DSU "shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1." Application of the DSU, however, shall be "subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2." The agreements listed in Appendix 1 encompass, inter alia, the Multilateral Agreements on Trade in Goods, including GATT 1994, as well as the GATS and the TRIPS Agreement. Thus, the DSU is generally applicable to all disputes between members unless there is an explicit reference to them in Appendix 2. This appendix identifies special and additional rules on the application of the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Textiles and Clothing, the Agreement on Technical Barriers to Trade, and others. No mention is made of any dispute settlement provision applying particularly to disputes concerning the national security exceptions. When concluding the Uruguay Round agreements, the members must have been aware of the problems such disputes would pose to the effective jurisdiction of the panels and the Appellate Body under the DSU. By not including a provision excluding the application of the DSU to disputes in which one of the members invokes the national security exceptions or a provision defining particular standards of review or any other particular rule applying to the resolution of such disputes, the members presumably decided that such disputes should not, in principle, be treated differently from other disputes under the covered agreements.

It therefore seems safe to conclude that there is little room for a direct jurisdictional defense against any review of measures taken under Article XXI. No matter how wide the drafters may have intended the application of Article XXI to be, at least in cases of clear abuse, such as when protectionist trade measures are only thinly veiled by invocations of national security, neither the CONTRACTING PARTIES nor the Dispute Settlement Body was to be excluded a priori from reacting.<sup>99</sup>

#### *Article XXI of GATT 1994 as an Indirect Jurisdictional Defense?*

Nevertheless, may a panel or the Appellate Body still reject jurisdiction on substantive grounds? Some authors argue that the text, history and teleology of Article XXI of GATT 1947/1994 suggest that, although in principle the WTO has the competence to review

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U.S. TARIFF COMMISSION, ANALYSIS: GENEVA DRAFT OF THE CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION 85 (1947). Articles 89 and 90 of the proposed ITO Charter were the equivalent of Article XXIII of GATT 1947. Of course, the limitations of the Tariff Commission's authority must be borne in mind.

<sup>98</sup> GATT, ANALYTICAL INDEX, *supra* note 67, at 600.

<sup>99</sup> On standards of review and judicial restraint, see text at notes 123–28 *infra*.



the exception, only the state parties themselves are able, thus competent, to properly interpret the provision.<sup>100</sup> According to this view, national security issues would not be justiciable.

Structurally, this argument could take two different forms. One might argue that, in principle, the authority to interpret the requirements for the application of Article XXI is (explicitly and/or implicitly) vested in the members. Alternatively, or cumulatively, one might argue that the specific requirements for triggering the national security exception, in particular the term "security interests," are not objective givens but essentially subjective parameters that require concretization—or definition—by the state itself before application. The first argument is unfounded, while the second is correct in principle and in part, but does not amount to a complete jurisdictional defense.

Article XXI makes elaborate distinctions<sup>101</sup> among three different types of action states may take contrary to their normal obligations under GATT: to hold back security-sensitive information (para. a); to act pursuant to obligations under the UN Charter (para. c); and to take "any action" they "consider[ ] necessary for the protection of [their] essential security interests" (para. b). The latter possibility, however, is conditioned by additional requirements: subparagraph (i) deals with nuclear materials, and subparagraph (ii) with trade in arms, ammunition, and the like. Subparagraph (iii), in contrast, differs from these two in structure: it does not refer to a sensitive type of merchandise but to certain types of extreme situations—war and other emergencies in international relations—in which any action considered necessary to remedy the threat to security involved is allowed, i.e., exempted from GATT obligations.

No explicit reservations with regard to an interpretive prerogative were made at the time of drafting. Nor is there conclusive evidence to support an implicit assumption of such a prerogative that would go beyond the textually given margins of justiciability discussed below. Some general statements that were made in the course of drafting and application (e.g., those cited above referring to the "spirit" in which Article XXI is applied as the only effective safeguard against abuse,<sup>102</sup> and those seeing each country as the "sole judge" with regard to its national security<sup>103</sup>) suggest that the contracting parties viewed the provision as an effective outlet for security concerns and corresponding political action. But there is no indication that this sentiment was intended—or accepted—as trumping the agreed text by importing a special meaning into some of its more open legal terms; indeed, as stated earlier, the elaborate structure of the provision strongly suggests the contrary. If states had intended to reserve their authority beyond the terms of the text, they could have done so, both in 1947 and at the conclusion of the Uruguay Round.

The key question, thus, is the justiciability of the agreed-upon language of Article XXI. We will examine its various components in turn.

Apart from paragraph (c), the principal prerequisite for the application of Article XXI is that a state party "consider" that an action is proscribed or necessitated by its essential security interests. This wording, in the eyes of some, invites an interpretation that places the decision to take action based on Article XXI(a) and (b) entirely within the discretion of the state, leaving no room for any kind of judicial review.<sup>104</sup>

<sup>100</sup> This view has been voiced by many, but usually without any thorough analysis of the text and context. See, e.g., Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW & POL'Y INT'L BUS. 604, 616 (1987).

<sup>101</sup> See our observations in the paragraph at note 37 *supra*.

<sup>102</sup> See *supra* note 98 and corresponding text.

<sup>103</sup> See *supra* note 73.

<sup>104</sup> Arguably, one could see such a reading in *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 116, para. 222 (June 27). There, the International Court of Justice

Two arguments show that this is not a sound reading of Article XXI. First, the act of "considering" whether an interest is threatened and which means are necessary to protect it is technical in nature. Once the interest (or political/military goal) is specified, the determination of the appropriate means for securing it is a matter of correctly assessing risks and possibilities. Arguably, the term "considers" allocates a substantial margin of discretion to the state in its choice of means. But, in sharp contrast to the definition of "its essential security interests" discussed below, this margin is not fundamentally a primary expression of the state party's necessary reserve of sovereign rights. Rather, it reflects a "right to be cautious"<sup>105</sup> while acting to protect them. This right, however, bears certain objective limits. Where a risk to a defined interest does not exist, or a measure will have no effect on protecting the interest it is meant to protect, the corresponding state action cannot be justified under Article XXI. These limits are clearly justiciable. Thus, an obviously wrong assessment of risks would not be covered by the term "considers," which does not per se exclude review that would respect the margin of discretion involved. Most national legal systems employ some reasonableness test in order to review governmental discretion. There is no reason, in principle, not to do the same here.

Second, the different approaches taken in paragraphs (a) and (b) negate equating "consideration" and "total discretion." Each provision puts the party's "consideration" in a different context. While paragraph (a) does not demand more than a threat to an essential security interest, paragraph (b) establishes certain additional requirements. If freedom to consider meant absolute discretion, this differentiation would be pointless. Thus, the question is whether, and to what extent, these requirements embody objective concepts open to *legal* interpretation (as opposed to *political* definition) and are therefore susceptible to judicial review within the WTO.

Paragraphs (a) and (b) both take as the first key requirement a threat to a party's "essential security interests." We assume that these interests, as a function of the state's understanding of its sovereignty and the legal position it entails, are essentially subjective<sup>106</sup> and based on the individual society's interpretation of itself as a player in

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(ICJ) evaluated the justiciability of the national security exception in Article XXI(d) of the 1956 U.S.-Nicaragua Treaty of Friendship, Commerce and Navigation, contrasting it with Article XXI of GATT. The 1956 Treaty provision states that "the present Treaty shall not preclude the application of measures . . . necessary to protect [a party's] essential security interests." The ICJ held:

That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT . . . stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests" . . . . The 1956 Treaty, on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such.

*Id.* Note, however, that the ICJ did not (and did not intend to) interpret Article XXI of GATT. The absence of the term "considers" from Article XXI(d) of the 1956 Treaty clearly suggests the ICJ's interpretation of it. Hence, the ICJ's conclusion that this provision is objective, and thus justiciable, is, as the Court points out, rather obvious. However, the ICJ did not address, either implicitly or explicitly, whether or not the presence of "considers" in Article XXI of GATT renders this provision nonjusticiable, in whole or in part. Hence, the ICJ's decision in this case leaves ample room for the differentiated interpretation of the term "considers" in Article XXI of the GATT that we suggest below.

<sup>105</sup> This concept is structurally similar to the "precautionary principle" in international environmental law. On that principle, see, e.g., Owen McIntyre & Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 J. ENVTL. L. 221 (1997); James Cameron & Will Wade-Gery, *Addressing Uncertainty: Law, Policy and the Development of the Precautionary Principle*, in ENVIRONMENTAL POLICY IN SEARCH OF NEW INSTRUMENTS 95 (Bruno Dente ed., 1995). See also EC Meat Products, *supra* note 84, paras. 120-25.

<sup>106</sup> One might contest that finding. As noted, in *Military and Paramilitary Activities in and against Nicaragua*, the ICJ concluded that, in the absence of the term "considers," the treaty clause "necessary to protect its essential

international relations.<sup>107</sup> At this stage of international relations, the state, as the "individual" concerned, is still the only one that can usefully define the content of the concept of sovereignty with respect to itself.<sup>108</sup> The function of the national security exception, as the Brazilian delegate put it in the discussions concerning the EC measures against Argentina in 1982,<sup>109</sup> is to provide "breathing space" for this ongoing self-definition of WTO members.

A wide range of legitimate "essential security interests" are conceivable. In principle, any policy interest of a certain intensity may be legitimately protected under Article XXI. There is, however, one rather clear inherent restriction on the members' definitional prerogative: security interests that are entirely a function of the economic capacities, activities and effects that are the very substance of WTO law are not covered. Actions driven by an interest in autarky are not immunized by Article XXI,<sup>110</sup> as economic interdependence is the necessary, and desired, effect of a system based on comparative advantage—the heart of the WTO system.<sup>111</sup> Hardships that arise from the operation of this system are given specific intrasystemic remedies, e.g., in Article XIX of GATT 1994. Thus, Article XXI does not serve to protect economic security interests. This restriction, in principle, is objective in character and thus appropriately subject to panel review.

"Security interests" that are "essential" must be defined in good faith by the state invoking them. Whatever their exact reach, it seems clear that not just any noneconomic political or military motive can satisfy the condition of essentiality. A requirement of a minimum degree of proportionality between the threatened individual security interest and the impact of the measure taken on the common interest in the functioning of the

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security interests" was justiciable. However, a close reading reveals that the ICJ did not see itself as authorized to provide its own interpretation of "essential security interests" but intended to exercise restraint:

[T]he concept of essential security interests certainly extends beyond the concept of armed attack, and has been subject to very broad interpretations in the past. The Court has therefore to assess whether the risk run by these "essential security interests" is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but "necessary".

¶86 ICJ REP. 14, 117, para. 224. The Court's ensuing application of the law to the facts is inconclusive with regard to who, ultimately, is to determine the exact content of "essential security interests," as a determination was not necessary: "Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to 'essential security interests' in May 1985, . . . the Court is unable to find that the embargo was 'necessary' to protect those interests." *Id.* at 141, para. 282. The ICJ's reference above to "reasonable" and "not merely useful but necessary" suggests, however, that the Court intended to exercise only general negative review to contain abuse or misuse. In so doing, it would have left the United States considerable room for its own definition of its essential security interests.

<sup>107</sup> See generally the study on international relations theory, *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* (Peter J. Katzenstein ed., 1996). See in particular Peter J. Katzenstein, *Introduction to id.*, and Ronald L. Jepperson, Alexander Wendt & Peter J. Katzenstein, *Norms, Identity, and Culture in National Security*, in *id.* at 33. This is not to say that sovereignty and its expressions, like national security, are in any way limitless. The question of the essence of sovereignty, of course, goes far beyond the scope of this study. For a recent study touching on the ever-closer limitations, or restrictive redefinitions, of features of sovereignty in different spheres of international law, see Franz X. Perrez, *The Relationship between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage*, 26 ENVTL. L. 1187 (1996).

<sup>108</sup> One may doubt whether this personification of the state is in principle an appropriate approach to the problem, but it seems indisputable that it is in (relevant) part an appropriate description of the phenomenon of sovereignty—and therefore the question of national security before us—as it is understood by those exercising it.

<sup>109</sup> See note 79 *supra* and corresponding text.

<sup>110</sup> In 1975 Sweden introduced a quota for certain types of shoes, arguing that the decrease in its domestic capacity to produce footwear, qualified as a "vital industry," threatened the country's economic defense strategy and thus its security interests. Many contracting parties correctly took the position that this was precisely the kind of justification not available under Article XXI. See further GATT, ANALYTICAL INDEX, *supra* note 67, at 603; art. 8 Hahn, *supra* note 12, at 578, 580.

<sup>111</sup> See generally JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 1-2, 7-14 (3d ed. 1995).

multilateral system can be deduced from both the term "essential" and, more generally, the function of Article XXI in the WTO system as a remedy for serious hardships<sup>112</sup> emanating from outside the WTO's immediate regulatory realm. The test for proportionality, here as in other areas of the law, is the reasonableness of the measure in the context. While a state is relatively free to define its security interests, their classification in part as "essential" must meet some higher standard in relation to other, "normal" security interests. Again, there is no inherent reason why a panel should not review that determination, sorting out cases of clear unreasonableness, without otherwise interfering with the state's definitional prerogative.

The text of Article XXI(a) leaves little room for third-party interpretive efforts. Wherever the forwarding of "information"<sup>113</sup>—which is a rather uncomplicated justiciable term—is in question, the only further prerequisite is the concerned member's "considering" that the disclosure threatens its essential security interests. This wording leaves vast discretion at the hands of the member invoking the provision. Although "consideration" must be exercised in good faith, showing that a government acted in bad faith is next to impossible in practice,<sup>114</sup> when the information to be disclosed is known only by the member concerned.<sup>115</sup>

The terms "fissionable materials" and "arms, ammunition and implements of war" in subparagraphs (b) (i) and (ii) have objective references and thus are plainly justiciable. In fact, the idea of a true dispute over the meaning of these terms seems far-fetched.<sup>116</sup> Also, the content of "other goods and materials," though less obvious, does not affect its justiciability, for the provision contains no language according discretion in the determination of the terms' meaning. On the contrary, this is a classic teleological catchall extension whose interpretation is to be based on the contextual analogies and teleological parameters prescribed, i.e., by reference to the purpose the goods and materials are to serve in the specific case. That purpose has to be similar to those potential uses that render the enumerated items ("arms," etc.) security-sensitive. A government's determination that the traffic in goods or materials is "carried on" for military purposes is an objective decision, which is inherently justiciable and, thus, in principle, suitable for judicial review.

Subparagraph (b) (iii) concerns "war or other emergency in international relations." War, alas, is one of the most venerable terms in international relations. Despite the innumerable cases of war, the meaning of the term "war" is still not completely clear. However, while it may be difficult at times to determine whether there is a war in a given situation, this determination is based on a long-established concept of international law and hence is *prima facie* a justiciable issue. In contrast, there is no firmly entrenched concept of "emergency" in international law. This part of the provision has been used, and abused, in most actual Article XXI cases. The issue here is not a substantive

<sup>112</sup> This understanding is underlined by the types of requirements set out in subparagraphs (b) (i)–(iii); see text at notes 116–18 *infra*.

<sup>113</sup> In most cases, this is an auxiliary duty under GATT, linked to more important primary obligations. See, e.g., GATT 1994, *supra* note 8, Arts. VI(6) (c), VII(1), X, XI(c), XII(4) (a), XVII(4) (a)–(c), XIX(2).

<sup>114</sup> An instance that might possibly show that a government acted in bad faith is the leaking of secret cabinet minutes. See Hahn, *supra* note 12, at 583.

<sup>115</sup> See, e.g., the statement of U.S. representative Evans, *supra* note 52, at 9, pointing out that under Article XXI a GATT party "shall not be required to give information which it considers contrary to its security interests. The United States considers it contrary to its security interests—and to the security interests of other friendly countries—to reveal the names of the commodities that it considers to be most strategic."

<sup>116</sup> The limited discussion in the 1949 *Czechoslovakia/U.S.* dispute referred to above does not provide a counterexample, as that discussion, apart from being very general, did not reach the point of differentiation between "arms" and "other goods and materials."

interpretation of this term but, rather, whether it requires a subjective definition by the member concerned or is susceptible to full judicial review.

Some states have taken this last requirement in conjunction with the introductory phrase of paragraph (b) as a catchall exception for actions they considered as serving their immediate political interests, which are not subject to review. But this assumes that the chapeau's requirement of subjective definitional assessments (in particular, regarding "essential security interests"; see above) also applies to subparagraph (b)(iii). Text and context do not support this reading. To read "other emergency" as catching every situation in which a state sees a threat, however small, to its essential security interests would drain the provision of all prescriptive content. A contextual reading suggests that subparagraph (iii) must be understood as having a function similar to the parallel provisions in (i) and (ii). They are clearly objective and additional prerequisites for the exercise of the rights under Article XXI(b). "Emergency," in other words, like "war," "fissionable materials" and "arms," sets a standard a member invoking Article XXI has to meet, not to define unilaterally.<sup>117</sup>

Parallel to the margin of discretion the state retains regarding the appropriate means to employ ("considers necessary/contrary," above), the purpose of the provision suggests that the complementary "right to be cautious" demands a margin of appreciation that is not overly narrow. The limits of this right and, therefore, the outer limits of the notion of "emergency in international relations" are matters of interpretation, i.e., justiciable issues.

The exact substantive reach of the term "emergency in international relations," of course, is open to discussion. The connection to the term "war" effected by the adjective "other (emergency)" suggests that the situation in question must exceed ordinary political tensions between states, if not actually involve some kind of military threat.<sup>118</sup> Incidentally, Article XXI(b)(iii) in no way differentiates between legal and illegal confrontations: even a clear aggressor would have all the rights under this provision, an apparent anomaly that sheds light on the particular role the national security exception plays within the WTO system. It insulates the system from essentially noneconomic international tensions. The need—or the members' desire for—such a safeguard shows that the "constitutionalization" of the world trade system is gradualist. Hence, one of the functions of Article XXI is to allow the WTO system to grow into a constitutional role beyond its original scope but not faster than a corresponding acceptance by the international community.

We can summarize the above findings as follows. All alternatives of Article XXI(a) and (b) are, to a varying degree, justiciable. A jurisdictional defense based on nonjusticiability has no basis. Even the mostly self-judging provision of paragraph (a) may usefully and appropriately be subjected to *some* judicial review with regard to the good faith with which it was exercised. A justification based on Article XXI(b) regarding any action not concerning either the furnishing of information or actions in pursuance of UN obligations must satisfy one of the objective, and justiciable, requirements in subparagraphs (i)–(iii). In determining an "emergency in international relations," as well as in considering whether an action is "necessary" for the protection of security interests, a party may exercise, in good faith, its "right to be cautious" as part of its sovereign right to protect its national security. The same applies to the determination, or "consideration," of the necessity of an action to protect "essential security interests." The determination of these

<sup>117</sup> See Hahn, *supra* note 12, at 589.

<sup>118</sup> For further thoughts, see *id.* at 589–91.

interests falls within the definitional prerogative of the WTO member. Its valid exercise, however, requires good faith, which, in principle, may be subject to review.

Thus, those parts of Article XXI identified as justiciable are within the realm of the legal interpretation to be effected by the competent bodies, i.e., the panels and the Appellate Body. Legal interpretation, as opposed to political definition, also establishes the outer limits of those concepts identified as being subject to definition or individualization by the member states. The definitional authority within these limits rests with the members.

### *Deference and Antidumping*

The question of deference to national governments within the WTO/GATT context has so far arisen most pertinently and prominently<sup>119</sup> in regard to antidumping. Article 17.6(ii) of the Anti-Dumping Agreement concluded in the Uruguay Round<sup>120</sup> provides that if the national authorities in charge have acted upon one of the "permissible" interpretations (if there are more than one), a panel must accept that interpretation.<sup>121</sup> Despite an apparent similarity at first glance, this is not analogous to deference to national governments under Article XXI.<sup>122</sup> In the context of antidumping, the allocation of interpretive authority is based on considerations of effectiveness. To allow for the effective application of technical law, national governments are accorded some authority to interpret WTO law as they apply it. Although they often have their own interests in the outcome of particular antidumping proceedings, the deference provided for in Article 17.6 of the Anti-Dumping Agreement is not designed to protect this interest in its own right but to maximize the effectiveness of the administration of the pertinent law, accepting as a side effect the possibility of a certain distortion through biased administration. Article XXI is different: the right of the national government to define its "essential security interests" does not amount to authority to interpret WTO law for the purpose of better administration but to define (as an inherent precondition to the correct construction and application of the pertinent provisions) those interests as part of its sovereign rights.

### *Standards of Review and Judicial Restraint*

The issue of justiciability and competence is to be distinguished from the problem of determining appropriate standards of review. Some scholars have observed that it is not in the interest of any WTO member to favor an interpretation of Article XXI that does

<sup>119</sup> One might add: before the recent *Hormones* decision, EC Meat Products, *supra* note 84, on the SPS Agreement. See *infra* notes 122, 124.

<sup>120</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, in Annex 1A to the Agreement Establishing the World Trade Organization, opened for signature Apr. 15, 1994, FINAL ACT, *supra* note 8, reprinted in WTO, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 168 (1995) [hereinafter LEGAL TEXTS].

<sup>121</sup> On the content and reach of this provision, see Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AJIL 193 (1996), discussing in particular the applicability of the U.S. *Chevron* doctrine in the WTO antidumping context.

<sup>122</sup> The Appellate Body recently held in EC Meat Products, *supra* note 84, that Article 17.6(i) of the Anti-Dumping Agreement (regarding deference in the establishment of facts) was "textually specific" to that Agreement. The Ministerial Decision on the Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, reprinted in LEGAL TEXTS, *supra* note 120, at 453, states: "The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application" (emphasis added). Following the U.S. view, the Appellate Body found that this Ministerial Decision "evidences that the Ministers were aware that Article 17.6 of the *Anti-Dumping Agreement* was applicable only in respect of that Agreement." EC Meat Products, *supra*, para. 114. Article 17.6 of the Anti-Dumping Agreement therefore cannot be analogized to other Agreements. See also note 124 *infra*.

not provide some "threshold" or "reasonableness" criterion.<sup>123</sup> We tentatively submit some thoughts as to the exact points where legal review by panels and the Appellate Body, equipped with interpretive, but devoid of definitional, authority could be usefully applied. Determining the limits of the member states' realm of definitional prerogative is highly difficult. Standards such as good faith, "based on the available evidence," or reasonableness, as well as combinations of these, could be applied. To develop more precise standards at this point would go beyond the scope of this short study, not to speak of current political acceptability. The standards will depend, of course, on the interpretation of the competent dispute settlement bodies of the terms and concepts identified as justiciable,<sup>124</sup> in their temporal context.<sup>125</sup> Thus, the interpretation of Article XXI is probably, more than that of other provisions, a function of the actual degree of "constitutionalization" of the system.

In our view, good faith seems to be the appropriate standard to be applied to the definitional prerogative for "security interests."<sup>126</sup> The general obligation to exercise good faith also has a procedural dimension. It demands that a member relying on Article XXI not only participate in panel proceedings, but also provide the information necessary for the panel to make the findings within its competence. In this context, as pointed out earlier, Article XXI(a) may assume particular relevance. If the state concerned bona fide refuses to disclose information needed for the application of Article XXI(b) (i)-(iii),<sup>127</sup> the exercise of this legitimate right must not be used against it in the ensuing decision on the merits. In other words, Article XXI(a) may provide a de facto or mediate jurisdictional defense where active participation can be legitimately withheld. With regard to concepts encompassing notions of instrumentality and proportionality, such as "considers necessary/contrary," "essential" and "other emergency," a reasonableness test seems to be the appropriate standard to

<sup>123</sup> See JOHN H. JACKSON & ANDREAS F. LOWENFELD, HELMS-BURTON, THE U.S., AND THE WTO 3 (ASIL Insight No. 7, 1997) (<http://www.asil.org/asil/insight7.htm>).

<sup>124</sup> In this context the recent report, EC Meat Products, *supra* note 84, provides a most interesting insight into the Appellate Body's approach to standards of review. Asked to determine the standard of review of members' protective measures under the SPS Agreement, the Appellate Body did two things: First, it all but unequivocally stated that the Dispute Settlement Body, its panels and the Appellate Body are competent to deal authoritatively with any matter of interpretation of the covered agreements:

In so far as legal questions are concerned—that is, consistency or inconsistency of a Member's measure with the provisions of the applicable agreement—a standard not found in the text of the *SPS Agreement* itself cannot absolve a panel (or the Appellate Body) from the duty to apply the customary rules of interpretation of public international law.

*Id.*, para. 118. Second, it held that, in the absence of an applicable specific standard-of-review provision, such as Article 17.6 of the Anti-Dumping Agreement, *see* text at notes 120–22 and note 122 *supra*, Article 11 of the DSU applied. As regards the establishment of facts, Article 11, in the Appellate Body's interpretation, *id.*, para. 114, provides neither for a *de novo* inquiry by panels nor for a "deferential 'reasonableness' standard," as the Community had contended, referring to Article 17.6 of the Anti-Dumping Agreement, but for an "objective assessment of the facts," *id.*, para. 116, apparently somewhere in between. However, the Appellate Body identified the notion of "risk" in the context of the SPS Agreement as a function of the scientific establishment of facts (and discussed the precautionary principle separately). For the reasons developed at length above, this could not apply directly in the context of Article XXI with regard to subjective concepts such as "essential security interests." Nevertheless, the Appellate Body clearly found that the system as a whole, in the context of international law and its standards of interpretation, is to be understood as providing the necessary framework for determining appropriate standards of review where necessary.

<sup>125</sup> For an—admittedly not necessarily reassuring—older example of a panel's search for adequate standards of review under GATT 1947, *see* United States—Restrictions on Imports of Tuna, June 1994, GATT Doc. DS9/R, para. 3.73, 33 ILM 839 (1994).

<sup>126</sup> The content and reach of the doctrine of good faith in its application are easily underestimated. For a substantive interpretation with regard to its application in the context of Article XXI, *see* Knoll, *supra* note 10, at 386–90. However, Knoll, without further explanation, doubts its judicial reviewability, *id.* at 589.

<sup>127</sup> *See* the statement by U.S. delegate Evans in the 1949 *Czechoslovakia* dispute, *supra* note 52, at 9.

accommodate both the objective aspects of those concepts and their inherent relativity, which we have called the "right to be cautious."

A panel faced with a case involving the invocation of Article XXI of GATT 1994 will have to exercise judicial restraint. There is nothing unusual in this. The balanced judicial review of administrative discretion regarding the choice of means through some kind of reasonableness or proportionality test seems to be the daily business of any administrative court. National, in particular constitutional, courts confronted with legal concepts requiring a policy decision reserved to a particular organ (e.g., parliament) or entity (e.g., a state in a federal system) routinely exercise judicial restraint to avoid making inroads into the reserved area by second-guessing. The U.S. Supreme Court, for example, has long developed a political question doctrine that allows the Court to decline to decide on "political questions," defined in *Baker v. Carr*, inter alia, as those involving "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."<sup>128</sup>

#### IV. HELMS-BURTON BEFORE THE WTO—A TENTATIVE OUTLOOK

How do the findings apply to the dispute over the Helms-Burton Act? It is not the purpose of this study to predict the final substantive outcome of the still-possible panel proceedings. However, a brief tentative outlook seems appropriate.

The plaintiff, the European Community, obviously would first have to demonstrate "nullification or impairment."<sup>129</sup> Substantial doubts have been voiced by different sides as to whether any GATT issue is involved in the questions over titles III and IV of the Helms-Burton Act.<sup>130</sup> Title I has direct trade effects. In the case of title III, the effect sometimes labeled "secondary boycott" could be seen with some reason as a relevant impairment of other WTO members' rights to trade freely with Cuba and the United States. However, the question of reasonable expectations could arguably go either way here.<sup>131</sup>

For its part, the United States would have to base its defense on Article XXI, more precisely paragraph (b) (iii), the only one that is potentially in point. It seems difficult, but not impossible, to qualify the strained relations between the United States and Castro's Cuba as a permanent emergency situation somewhat resembling the adjacent concept of war. The United States would next have to explain which security interests are involved (property rights of its citizens, democracy in Cuba,<sup>132</sup> or generally the threats

<sup>128</sup> 369 U.S. 185, 217 (1962). The German Constitutional Court has developed a similar approach, respecting, where appropriate, the "discretionary prerogative" (*Einschätzungsprärogative*) of the organ or entity concerned.

<sup>129</sup> For a list of (possible) GATT violations, see text at note 31 *supra*; and, e.g., Brian J. Welke, *GATT and NAFTA v. the Helms-Burton Act: Has the United States Violated Multilateral Agreements?* 4 TULSA J. COMP. & INT'L L. 361, 367–70 (1997); Luisette Gierbolini, *The Helms-Burton Act: Inconsistency with International Law and Irrationality at their Maximum*, 6 J. TRANSNAT'L L. & POL'Y 289 (1997) (discussing GATT violations at 313–15). In contrast, Pavel K. Chudzicki, *The European Union's Response to the Libertad Act and the Iran-Libya Act: Extraterritoriality without Boundaries?* 28 LOY. U. CHI. L.J. 505, 545–46 (1997), sees no violation of GATT but of GATS, and, in any case, a general threat to the WTO system, *id.* at 547. See also Spanogle, *supra* note 13.

<sup>130</sup> See, e.g., August Reinisch, *Widening the US Embargo against Cuba Extraterritorially: A Few Public International Law Comments on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 7 EUR. J. INT'L L. 545, 560–61 (1996). Spanogle, *supra* note 13, finds no GATT or GATS violation in titles III and IV of the Act, *see id.* at 1325–28, but considers that title I violates Articles I and V of GATT 1994, *id.* at 1318–25.

<sup>131</sup> See, on the one hand, Spanogle, *supra* note 13, at 1327, in particular n.73, who regards that concept as inapplicable (and thus as not providing a basis for a (nonviolation) complaint); and, on the other hand, Bhala, *supra* note 43, at 279, who sees a clear and credible nonviolation claim against the secondary effects of Helms-Burton.

<sup>132</sup> See, e.g., Act, *supra* note 5, §301(6)(A), (B).



perceived with regard to Castro, such as nuclear danger and the flow of refugees<sup>133</sup>) and why these are of essential, as opposed to general, importance. Finally, the United States would have to demonstrate why the actions taken are necessary to protect those interests.

The U.S. qualification of the situation as an emergency, as suggested above, would have to pass a test of reasonableness. The definition of its "security interests" in this context would be entirely up to the United States. The panel would confine itself to excluding cases of clear abuse (not "essential"), in particular hidden economic interests. Presumably, whether the actions are necessary to protect those interests would again be subject to a reasonableness test, which would assess in particular the potential of the means employed to remedy the problem. This test would probably be the most formidable challenge for the United States. It is unclear whether, in a WTO system based on the idea of comparative advantage through general trade liberalization, a measure whose primary effect is to penalize third parties can be justified on the basis of its, arguably legitimate, secondary effect. The panel would have to consider this aspect as part of the question of necessity, which encompasses the concept of proportionality, taking into account the positions of those affected.

Thus, at first glance it is not clear what results a panel and the Appellate Body would reach in this case. In sum, there are some good reasons for supposing that Helms-Burton, at least the most contentious titles, III and IV, would surmount this hurdle largely unaffected.

#### V. CONCLUDING REMARKS

In principle, the competence of the WTO Dispute Settlement Body, the panels and the Appellate Body to hear and pass judgment on cases of nullification or impairment is neither directly nor indirectly limited by the invocation of the national security exception of Article XXI of GATT 1994 by the defendant state party. Nevertheless, history, function, state practice and the text of the provision strongly suggest that parts of the legal requirements set out are essentially subjective concepts to be defined *in concreto*, in most instances, by the defendant party. In particular, the concept of national security, or "essential security interests," is a function of contemporary sovereignty, and as such demands individualization, or individual definition, by the state concerned before its juridical application is possible. The same applies, to a limited extent, to the related concepts of "emergency" and "necessity." WTO members, in other words, reserve a certain definitional prerogative to themselves. Any panel dealing with such issues will have to defer to the government concerned in that regard.

Nevertheless, the reach of this prerogative is limited by the concepts themselves. They are broad and in need of further definition but are clearly not unlimited. To establish these limits is an interpretive task and as such is subject to panel and Appellate Body review. That review is imperative is amply demonstrated by the obvious danger of abuse, as well as the essentially rule-based approach underlying the WTO in general, and the "new" dispute settlement mechanism in particular. The world trading system's policies of security and predictability (DSU Art. 3) demand that some controls be placed on such discretion.

This limiting interpretation will take into account systemic, teleological and, in particular, "constitutional" aspects. It is essentially negative: it must filter out those bases for action that are not motivated and necessitated by extreme political, as opposed to economic, circumstances or aims, while leaving the areas requiring positive definition by the state concerned untouched. In practice, this process requires a full substantive

<sup>133</sup> See generally *id.* §3 ("Purposes" of the Act).

justification on the merits by the state party invoking Article XXI—within the limited obligation to furnish sensitive information (Art. XXI (a))—and judicial restraint on the part of the reviewers on matters where the definitional prerogative of the states concerned takes precedence. This is not unusual. Every constitutional system requires the players to respect each other's realms.

The point of the argument is that the approach taken here, which seems to be the only one supported by the text and context of the law as it stands, "civilizes" disputes over national security issues that make potentially harmful inroads into the backbone of international society's peacetime order—namely, the world economic system more or less represented by the WTO and the quasi-comprehensive system of agreements under its umbrella. With the advent of the WTO, this system's evolution has acquired a somewhat new quality that one might, carefully, call the "constitutionalization" of the world economic order. In establishing a quasi-judicial dispute settlement mechanism, the contracting parties of the Uruguay Round initiated this development. Eventually, this will shift the basis of the system, if not all its features, from power to law.

One constitutive feature of the system, however, that will remain for some time to come, is its members' sovereignty, at the core of which lies national security. It is in the self-interest of the system to protect, or allow for the protection of, that value where it is threatened or perceived in good faith as threatened. But it is equally central to contain abuse, for it could shake the stability that has enabled most of the other values to flourish. This balance, however, must clearly be maintained *within* the system itself.

The sudden assumption of leadership in the international community's drive toward what we call "constitutionalization" has put the WTO and its dispute settlement mechanism into a somewhat uncomfortable position. The increased popularity of the strengthened dispute settlement mechanism has brought judicial competence and powers, both with respect to the WTO system's external position in the greater realm of international law and with respect to its internal position vis-à-vis the sovereignty of its members, to the top of the agenda. The WTO panels can no longer avoid, as they did in the old GATT days, confronting the problem of the kind and degree of constitutionalization of which the WTO is both a cause and an effect.

The answers offered above to the question of the jurisdictional treatment of the national security exception—like those suggested elsewhere regarding the WTO's problem of forum choice and conflicting regimes<sup>134</sup>—are conclusions based on classic, if sometimes creative, legal interpretation. But they also take into account the specific role the WTO dispute settlement mechanism plays at present and is bound to play in the foreseeable future. The system's ability to embrace and integrate the necessary elements of resolution, i.e., to avoid a protrade bias when deciding on mixed matters and to respect the members' definitional prerogatives regarding national security while correctly delineating their limits, will be the yardstick not only of its own success but of the world order's constitutionalization itself.

<sup>134</sup> See note 2 *supra*.

## EDITORIAL COMMENT

### PROGRESS IN INTERNATIONAL CRIMINAL LAW?

Over the past year the world has witnessed substantial developments in international criminal law. During the summer of 1998, the United Nations sponsored a major diplomatic conference in Rome to negotiate a statute for a new international criminal court (ICC). After five weeks of intensive negotiations, the conference adopted the statute by a large majority. When established, the court will serve as a permanent tribunal for the prosecution of certain international crimes.<sup>1</sup> Early in the fall of 1998, the International Criminal Tribunal for Rwanda (ICTR) obtained the first conviction by any international court for the crime of genocide in the case against Jean-Paul Akayesu.<sup>2</sup> Later in the fall, Spain sought extradition from the United Kingdom of Augusto Pinochet, the former Chilean dictator, to prosecute him for genocide and torture in the deaths and disappearances of thousands of people.<sup>3</sup> Finally, the International Criminal Tribunal for the former Yugoslavia (ICTY) ended 1998 with the conviction of Anto Furundžija, based in part on his command authority, for violations of the laws or customs of war, including torture and outrages upon personal dignity, among them rape.<sup>4</sup>

Each of these events appears to reflect growing support by the international community for effective enforcement of international criminal law. Indeed, some international criminal law has been included within general international law at least since the Nuremberg trials. Subsequently, this area of international law was little used; only recently has this changed. New developments suggest that there has been major movement toward the active and effective application of this law. Many believe that this progress heralds a breakthrough in the achievement of rights protected by international criminal law. I am less sanguine, albeit cautiously optimistic. While these new developments augur well for international criminal law, at the same time they serve to highlight the realities in which it must operate. Aggressive prosecutions of these grave international crimes are easy to support, but they may also present difficult conflicts with other objectives of the international legal and political system. Prosecutions of international crimes highlight tensions between international politics on the one hand, and the

<sup>1</sup> Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9\* (visited Mar. 15, 1999) <<http://www.un.org/icc>> [hereinafter ICC Web site], reprinted in 37 ILM 998 (1998) [hereinafter ICC statute], and in *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on International Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 79 (1998) [hereinafter ICC Hearing].

<sup>2</sup> Prosecutor v. Akayesu, Judgement, No. ICTR-96-4-T (Sept. 2, 1998) (visited Mar. 15, 1999) <<http://www.icttr.org>>, summarized in 37 ILM 1401 (1998); and in 93 AJIL 195 (1999).

<sup>3</sup> For the indictment (Auto de procesamiento) (in Spanish), see (visited Mar. 16, 1999) <<http://puntofiscal.es/espacial/justicia/justicia.html>> and <<http://www.elpais.es/p/d/espacial/procesa>>. For edited excerpts of the indictment (in English), see *They Drove Augusto Pinochet to Face Justice Yesterday. This Is Why*, INDEPENDENT, Dec. 12, 1998, at 1. A full English translation is expected to be available through a link to (visited Mar. 16, 1999) <<http://www.interact.com/~publica/case.html>>. The validity of the Spanish indictment was upheld in *In re Pinochet*, Nov. 4, 1998, and Nov. 5, 1998 (Nos. 19/97, 1/98, respectively, Nat'l Ct., Crim. Div.) (Pen. sess.). Other prosecutions have also been initiated against Pinochet for such crimes, e.g., *In re Pinochet Ugarte*, Trib. 1st inst. Brussels (investigating magistrate), Nov. 8, 1998; *Pinochet v. Procureur de la République [Chanfreau, Claudet & Pesle]*, T.G.I. Paris, Order, Nov. 2, 1998; *Pinochet v. Procureur de la République [Esquet & Klein]*, T.G.I. Paris, Order, Nov. 12, 1998; *Pinochet v. Procureur de la République [Ropert Contreras & Père Jarlan]*, T.G.I. Paris, Orders, Dec. 10, 1998. All of these domestic cases will be summarized in the July 1999 issue of the *AJIL*.

<sup>4</sup> Prosecutor v. Furundžija, Judgement, No. IT-95-17/1-PT (Dec. 10, 1998) (visited Mar. 15, 1999) <<http://www.un.org/icty>>.

enforcement of the law's natural-justice goals on the other. One might hope that the recent developments favor a more active and apolitical approach to these crimes, yet it is not clear that a significant change has occurred.

Although the establishment of the ICC may make a difference in the future, heretofore the international community has made only limited use of international courts to adjudicate international human rights law, not to speak of their use for criminal prosecutions. The ICTY and the ICTR were established only recently in the context of a unique confluence of circumstances; as a result, they were granted limited mandates.<sup>5</sup> No other existing international courts even have jurisdiction to entertain international criminal prosecutions. Certainly, the European Court of Human Rights is a notable positive example of an active regional human rights court.<sup>6</sup> It functions, however, in the context of Western developed states that strongly support court enforcement, basic human rights and humanitarian law. Moreover, it has no criminal jurisdiction. The only other functioning international human rights court is the Inter-American Court of Human Rights. It has become active in recent years and achieved moderate success, but it also lacks criminal jurisdiction.<sup>7</sup> The African Charter on Human and Peoples' Rights (Banjul Charter) has no associated human rights court and the regime has not been especially effective.<sup>8</sup> No other region of the world can even boast an international human rights regime, much less a regional international criminal court. Similarly, at the global level there are many international agreements on human rights, humanitarian law and the laws of war. Two significant international organs are the United Nations Economic and Social Council's Human Rights Commission and the Human Rights Committee established under the Optional Protocol to the International Covenant on Civil and Political Rights.<sup>9</sup> Although they increasingly function in a quasi-judicial manner, they also do not have criminal jurisdiction.<sup>10</sup> Thus, the ICC is unprecedented as a potential standing court of global reach with a wide range of international crimes within its jurisdiction.<sup>11</sup>

<sup>5</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Statute, UN Doc. S/25704, annex (1993), *reprinted* in 32 ILM 1192 (1993) [hereinafter ICTY Statute]; International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, Statute, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), *reprinted* in 33 ILM 1602 (1994).

<sup>6</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Arts. 19–37, 213 UNTS 221. See J. G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* (1993).

<sup>7</sup> American Convention on Human Rights, Nov. 22, 1969, Arts. 33, 52–73, OASTS No. 36, 1970, 1144 UNTS 123. See SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* (1997); Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297 (1995); Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U. J. INT'L L. & POL'Y 333 (1994).

<sup>8</sup> African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, *reprinted* in 21 ILM 58 (1982). See Burns H. Weston, Robin Ann Lukes & Kelly M. Hnatt, *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585, 608–14 (1987).

<sup>9</sup> Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

<sup>10</sup> See Tom J. Farer & Felice Gaer, *The UN and Human Rights: At the End of the Beginning*, in UNITED NATIONS, *DIVIDED WORLD* 240 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993).

<sup>11</sup> ICC jurisdiction is limited to persons who are nationals of states parties to the statute or who committed listed crimes within the territory of a state party. ICC statute, *supra* note 1, Art. 12. The crimes within the court's jurisdiction include genocide (Arts. 5(1)(a) & 6), crimes against humanity (Arts. 5(1)(b) & 7), war crimes (Arts. 5(1)(c) & 8), and (once an agreement is reached in the future) aggression (Art. 5(1)(d) & (2)). Furthermore, if the accused is the subject of prosecution in a domestic court, prosecution before the ICC is essentially precluded. *Id.*, Arts. 17, 20.

The adoption of the ICC statute and the likely establishment of the court could add new vigor to international criminal law enforcement. These developments are the culmination of the groundwork laid by the Nuremberg and Tokyo Tribunals after World War II.<sup>12</sup> They also build on the recent progress made by the ICTY and the ICTR. Viewed from this perspective, the adoption of the ICC statute has advanced international law. The statute itself contains definitions of international crimes that are subject to prosecution before the ICC. These largely reflect definitions found elsewhere.<sup>13</sup> The negotiation and inclusion of those definitions in the statute has contributed to the development of general international criminal law.<sup>14</sup> Thus, the illegality under international law of the gravest human rights violations of genocide, crimes against humanity, war crimes and the crime of aggression (when the definition of the latter is finally settled) will be reinforced as a result of the adoption and entry into force of this statute.<sup>15</sup>

One hundred and twenty states voted to adopt the ICC statute, seven states voted against, and twenty-one states abstained.<sup>16</sup> Although the vote was overwhelming, attracting widespread support from all continents, political systems and economies, the United States voted against. Since the vote was unrecorded, the identities of the other opposing states are not certain. There is little doubt, however, that they included China, Israel, Libya and Iraq.<sup>17</sup> The United States actively participated in the negotiations and maintains that it would support an ICC statute differing only slightly, albeit in important respects, from that adopted by the conference.<sup>18</sup> The true level of U.S. support, however, is difficult to gauge. Congress is on record as opposed to the court.<sup>19</sup> Furthermore, it is not clear that U.S. support for the ICTY and the ICTR readily translates into support for a standing ICC, absent UN Security Council control giving the United States veto authority over every prosecution. Some believe that if the U.S. position were adopted, the court would be no more than a slightly expanded version of the ICTY and the ICTR, since the ICC prosecutor would not have relatively unfettered authority to prosecute when jurisdiction can be obtained. Other states that voted against the statute or abstained are also reluctant to empower an international criminal court that would actively pursue their nationals for international crimes. Some of these states consider prosecu-

<sup>12</sup> Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279; Protocol to Agreement and Charter, Berlin, Oct. 6, 1945, 59 Stat. 1586, 3 Bevans 1286; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, TIAS No. 1589, 4 Bevans 20 (amended Apr. 26, 1945, 4 Bevans 27).

<sup>13</sup> See Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AJIL 22, 29–36 (1999); Darryl Robinson, *Defining "Crimes against Humanity" at the Rome Conference*, 93 AJIL 43 (1999).

<sup>14</sup> The provisions in the statute distancing the definitions of crimes within the ICC's jurisdiction from general international law were intended to avoid obstructing further development of the law and not to prevent those definitions from influencing its evolution: "Nothing in [the definitions of crimes in this statute] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." ICC statute, *supra* note 1, Art. 10. Regardless of this text or its purpose, it is unavoidable that such important and rare multilateral-treaty-based definitions of these crimes will influence the general international law on the subject. See Jonathan I. Charney, *Universal International Law*, 87 AJIL 529 (1993).

<sup>15</sup> See ICC statute, *supra* note 1, Arts. 6–8.

<sup>16</sup> See ICC Web site, *supra* note 1.

<sup>17</sup> See Robert F. Drinan, *An International Criminal Court: Holy See, Yes; U.S.A., No*, AMERICA PRESS, Oct. 10, 1998, available in 1998 WL 13368213 (China, Libya, Iraq, Israel, Qatar, the United States and Yemen); *Palestinian Leaders Hail UN "Pejoration" of Israeli Occupation*, AGENCE FRANCE-PRESSE, July 25, 1998, available in LEXIS, News Library, Curnws File (China, India, Iraq, Israel, Libya, Russia and the United States); Gwynne Dyer, *World Court Second Blow for U.S.*, TORONTO STAR, July 24, 1998, at 1 (China, Libya, Algeria, Iraq, Israel, the United States, and one or two others).

<sup>18</sup> See David J. Scheffer, *The United States and the International Criminal Court*, 93 AJIL 12 (1999); ICC Hearing, *supra* note 1, at 9.

<sup>19</sup> Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year Ending September 30, 1999, and for other Purposes, Pub. L. No. 105-277, §§554, 2502, 112 Stat. 2681, 2681-188, 2681-836 (1998). See *We must slay this monster: Personal View Jesse Helms*, FIN. TIMES (London), July 31, 1998, at 18.

tions before the ICC as sufficiently linked to international peace and security to require the support of the Security Council in each case, giving the permanent members the ability to veto a prosecution. Others favor denying the ICC jurisdiction over matters on the Security Council's agenda. These views make clear that a key obstacle to the ICC is that its activities could touch on highly political interests over which some states are not willing to relinquish control, even to facilitate prosecution of international crimes. This sensitivity is consistent with the historic linkage of those crimes to international political relations. In light of the opposition of at least two major states (and, in all likelihood, a third—Russia), at this time it appears that the success in Rome may not easily lead to the kind of ICC sought by its strongest supporters.

History supports this view. Of all the international crimes, genocide may be considered the most firmly established. The Genocide Convention dates from 1948 and has many adherents.<sup>20</sup> Nevertheless, the 1998 *Akayesu* decision is the first conviction by an international tribunal for the crime of genocide. The Nuremberg Tribunals never convicted a person of genocide despite irrefutable evidence of its widespread practice by the Nazis. A few such criminal prosecutions have been pursued by domestic courts with mixed results.<sup>21</sup> At the same time, there is every reason to believe that many others have committed genocide since Nuremberg, the most prominent being the Khmer Rouge in Cambodia and Saddam Hussein's regime in Iraq. Prosecutions for those crimes have not been instituted to date. Other than further prosecutions before the ICTR and the ICTY under their limited jurisdiction, no prosecution of an individual for genocide has been brought before an international court. Those who supported initiatives to prosecute the leader of the Khmer Rouge, the late Pol Pot, for his genocidal acts were unsuccessful.<sup>22</sup> Recently, three other leaders of the Khmer Rouge emerged from hiding and the prosecution of its leading members is being promoted, but the chances of serious proceedings appear bleak.<sup>23</sup> Pinochet may yet be subject to prosecution for international crimes before a Spanish court. Notwithstanding the Spanish indictment for genocide, if extradition from the United Kingdom is obtained, prosecution for this crime will be precluded under the doctrine of speciality.<sup>24</sup> Such a weak record has been achieved despite the fact that genocide is considered to be an especially grave international crime and that, since it is a universal crime, a prosecution can be brought against a person who may have committed it by any state that obtains custody of the accused.

Not only is universal jurisdiction available to apprehend persons for the crime of genocide, but it is supposed to be well established in international law for the prosecution of all international crimes.<sup>25</sup> It was a basis for domestic prosecutions of pirates and slave traders, but it is hardly used now and is often controversial. Thus, the *Eichmann* case resulted in a heated controversy in the UN Security Council because of the way Adolf

<sup>20</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277.

<sup>21</sup> See *Attorney-General v. Eichmann*, 45 Pesakim Mehoziim 3 (1965), 36 ILR 5, 233 (D.C. Jm. 1961), *aff'd*, 16 Piskei Din 2003, 36 ILR 277 (S. Ct. 1962) (Isr.) (genocide); *Effectuating International Criminal Law through International and Domestic Fora: Realities, Needs and Prospects*, 91 ASIL PROC. 259 (1997); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Trouvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994).

<sup>22</sup> See Elizabeth Becker, *Pol Pot's End Won't Stop U.S. Pursuit of His Circle*, N.Y. TIMES, Apr. 17, 1998, at A11.

<sup>23</sup> See identical letters dated 21 January 1999 from the Permanent Representative of Cambodia to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/53/801-S/1999/67 (Jan. 22, 1999); Seth Mydans, *Of Top Khmer Rouge, Only One Awaits Judgment*, N.Y. TIMES, Mar. 14, 1999, at 6; Elizabeth Becker, *U.N. Panel Wants International Trial for Khmer Rouge*, N.Y. TIMES, Mar. 2, 1999, at 1 (China threatens Security Council veto).

<sup>24</sup> Extradition from the United Kingdom, if granted, will not cover the crime of genocide. The doctrine of speciality will limit the Spanish prosecution to the crimes for which Pinochet is extradited—torture after December 8, 1988—if he is extradited at all. See text *infra* at note 33.

<sup>25</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §404 (1987).

Eichmann was removed from Argentina.<sup>26</sup> The recent U.S. extradition to Israel of John Demjanjuk was based on universal jurisdiction. Nevertheless, after he was acquitted by the Israeli courts, the original extradition judgment was vacated because the U.S. court found that in seeking the extradition order, the attorneys for the U.S. Government had acted improperly.<sup>27</sup>

One reason for the reluctance to exercise universal jurisdiction for these highly political crimes is that it may subject the prosecuting state to pressure by other states that wish to avoid exposure of their complicity. Perhaps the ICC could, directly or indirectly, shift some of this risk away from the state with custody of a suspect and thus overcome obstacles to these prosecutions.<sup>28</sup> Despite efforts by some states, the ICC was not granted broad jurisdiction based on universality but, rather, only on nationality and territorial jurisdiction, except in regard to matters referred to it by the Security Council.<sup>29</sup> This outcome suggests that states may not have overcome their reluctance to prosecute these crimes aggressively.

The *Pinochet* case brought to the fore another political dimension of these prosecutions that has not yet been resolved. Pinochet resisted extradition from the United Kingdom by claiming diplomatic immunity and immunity as a former head of state. These immunities

<sup>26</sup> See *Attorney-General v. Eichmann*, *supra* note 21, 36 ILR at 304 (universal jurisdiction); SC Res. 138, UN SCOR, 15th Sess., Res. & Dec., at 4, UN Doc. S/INF/15/Rev.1 (1960); Report of the Security Council to the General Assembly, 16 July 1959–15 July 1960, UN GAOR, 15th Sess., Supp. No. 2, at 19–24, UN Doc. A/4494 (1960) (reporting on the above resolution but identifying it as S. 4345).

<sup>27</sup> *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993). There have been a few other examples of the successful use of universal jurisdiction by domestic courts. Interestingly, they arise out of the Yugoslav conflict and would be within the jurisdiction of the ICTY, indicating that the establishment of the ICTY has in some way facilitated such domestic prosecutions. See Andreas R. Ziegler, Case note, *In re G.*, 92 AJIL 78 (1998) (Mil. Trib., Dec. 1, 1997) (Switz.) (describing the prosecution for violations of the laws and customs of war in Bosnia-Herzegovina based on universal jurisdiction, but noting that the accused was not convicted in this case); Christoph J. M. Safferling, Case note, *Public Prosecutor v. Djajić*, 92 AJIL at 528; Director of Public Prosecutions v. T (E. High Ct. 3d Div. 1994) (Den.) (Ministry of Foreign Affairs Legal Service, unofficial trans.) (convicting on the basis of universal jurisdiction for war crimes and crimes against humanity committed in Croatia) (on file with author). In two French criminal cases, involving actions in the former Yugoslavia and in Rwanda, the courts denied universal jurisdiction. *In re Javor*, Cass. crim., Mar. 26, 1996, 1996 Bull. Crim., No. 132, 379; *In re Lukyushyaka*, Cass. crim., Jan. 6, 1998, 1998 Bull. Crim., No. 2, 3. These cases are summarized *infra* at p. 525.

<sup>28</sup> Support for this result can be found in the fact that there have been two clusters of such domestic court prosecutions. The first cluster includes the prosecutions of Nazis and Nazi supporters arising out of World War II that furthered the goals of Nuremberg and the political consensus supporting that Tribunal. The second includes several prosecutions for the crimes that are also within the jurisdiction of the ICTY and the ICTR, thus building upon the lead taken by these Tribunals. See *supra* notes 26, 27. Rwandan national courts are also prosecuting these crimes. The mere existence of these international tribunals may have provided indirect political protection for the prosecuting states. Such protection may also be a byproduct of the ICC. Furthermore, the ICC may ease the burden on a state holding a suspect that wishes neither to undertake domestic proceedings nor to refer the case to the international court, as it may initiate the prosecution itself (perhaps through a nonpublic communication from a state) or in response to a referral by the UN Security Council.

<sup>29</sup> ICC statute, *supra* note 1, Art. 12. Some suggest that the exercise of universal jurisdiction by the ICC, absent reference by the Security Council, would violate international law by essentially imposing the ICC regime on nonparty states. I question this view. If a state has universal jurisdiction over a suspect, it may choose to prosecute that person in its domestic courts or to delegate that authority to other courts, including the ICC (assuming relevant human rights are protected). The nonparty status of the accused's state of nationality is irrelevant; rather, the state's possession of the accused is the relevant basis of authority and jurisdiction. Consistent with this view is the fact that many states, including the United States, are parties to international agreements allowing prosecutions of nationals of nonparty states for international crimes, e.g., Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 UNTS 85; International Convention against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,331, 1316 UNTS 205. Referral by the Security Council involving a state that is not a party to the ICC statute presents a somewhat different situation. If the Council acts under its Chapter VII authority, its decision binds all parties to the UN Charter as well as parties to the statute. UN CHARTER Art. 25. With respect to states that are not parties to the United Nations or the ICC, the Charter commits the Organization and member states to ensure their compliance. *Id.*, Art. 2(6). See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, 56, 58, paras. 126, 127, 133(3) (June 21).

were denied him on the first appeal before the House of Lords by a close vote of 3-2. As a consequence, the Government allowed the proceedings to continue.<sup>30</sup> In denying Pinochet's claim of immunity for the international crimes of torture and hostage taking of which he stood accused, Lord Nicholls wrote in the majority: "[I]nternational law has made plain that certain types of conduct . . . are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law."<sup>31</sup> One member of the majority on the Law Lords panel was subsequently found to have improperly participated and, as a result, the matter was reheard before a new panel.<sup>32</sup>

The second panel again denied Pinochet's immunity claims by a strong 6-1 majority, although it significantly limited the grounds on which he could be extradited to crimes of torture committed after December 8, 1988—that is, the date after which the UK, Spanish and Chilean courts all had jurisdiction over the extraterritorial commission of the crime of torture, pursuant to the Torture Convention.<sup>33</sup> While none of the six opinions in the majority contain an eminently quotable systemic statement comparable to that of Lord Nicholls and it is hard to draw common conclusions from the seven separate opinions in the second substantive Law Lords decision, certain conclusions are indeed notable. All six in the majority agreed that implicit in the illegality of torture under domestic and international law was the inapplicability of immunity doctrines. Thus, no explicit or implicit finding of a waiver of the three types of immunities examined (state immunity, immunity *ratione personae* and immunity *ratione materiae*) needed to be found. All six also found the international crime of torture as incorporated into English law to be a *jus cogens* rule of international law subject to universal jurisdiction. This stands as a significant precedent in support of the prosecution of international criminal law and the irrelevance of various forms of immunities that may be claimed.

If the most recent House of Lords decision had been otherwise, it could have served as an important precedent allowing immunity law to substantially undermine international criminal law. These crimes are normally conducted under the auspices of the government itself. If immunities are available to the leadership, the forces behind such crimes would be insulated from prosecution.

The denial of immunity in the *Pinochet* case also raises legitimate concerns. Despite the initial support by the highest courts of the United Kingdom and Spain,<sup>34</sup> the political branches of both Governments were apparently less than enthusiastic about the request for extradition and the prosecution.<sup>35</sup> The same is reportedly true of the United States

<sup>30</sup> Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [1998] 3 W.L.R. 1456 (H.L.), reprinted in 37 ILM 1302 (1998) [hereinafter *Pinochet I*]. See Warren Hoge, *Briton Won't Free Pinochet, Ruling the Case Can Proceed*, N.Y. TIMES, Dec. 10, 1998, at A3.

<sup>31</sup> *Pinochet I*, *supra* note 30, 37 ILM at 1333 (Lord Nicholls).

<sup>32</sup> Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [1999] 2 W.L.R. 272 (H.L.), reprinted in 38 ILM 430 (1999) [*Pinochet II*]. See Warren Hoge, *Pinochet Wins a Round as the Law Lords Void a Ruling*, N.Y. TIMES, Dec. 18, 1998, at A3.

<sup>33</sup> Convention against Torture, *supra* note 29. Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [1999] 2 W.L.R. 827 (H.L.) [hereinafter *Pinochet III*]. The six in the majority were Lords Browne-Wilkinson, Hope of Craighead, Hutton, Saville of Newdigate, Millett, and Phillips of Worth Matravers. Lord Goff of Chieveley dissented on the ground that Chile had not waived state immunity. This decision will be summarized in the July 1999 issue of the *AJIL*. In conformity with his decision after *Pinochet I*, *supra* note 30, the British Home Secretary permitted the extradition proceedings to go forward subsequent to the Law Lords' decision in *Pinochet III*, *supra*. See Warren Hoge, *Britain Decides to Let the Pinochet Extradition Case Proceed*, N.Y. TIMES, Apr. 16, 1999, §1, at 4.

<sup>34</sup> *Pinochet I*, *supra* note 30. See Marlise Simons, *Judges in Spain Assert Pinochet Can Face Trial*, N.Y. TIMES, Oct. 31, 1998, at A1.

<sup>35</sup> See Warren Hoge, *Pinochet's Case Moves to Realm of Blair's Aides*, N.Y. TIMES, Nov. 27, 1998, at A1; Marlise Simons, *Pinochet's Spanish Pursuer: Magistrate of Explosive Cases*, N.Y. TIMES, Oct. 19, 1998, at A1.



and probably many other states.<sup>36</sup> They do not want their former heads of state subjected to international criminal prosecutions in foreign states. Furthermore, states wish to avoid complications in their political and economic relations that may be produced by these prosecutions despite the gravity of the crimes and their adverse impact on international peace and security. Thus, it is likely that the denial of immunity in the *Pinochet* case may make prosecutions of international crimes easier, at the same time that states will remain relatively reluctant to undertake them, except in the most compelling cases.

The effort to prosecute Pinochet, moreover, raises questions about the immunity a state may wish its former rulers to hold so as to ease the transition to a new (perhaps better) government. The claim regarding Pinochet is not the best situation on which to base this argument because he obtained immunity under Chilean law well before relinquishing control. He also retained sufficient power and influence in Chile to protect his interests afterwards.<sup>37</sup> Even in that situation, however, the incoming government apparently acquiesced in the arrangement, determining that its cost was worth the peaceful transition to a new government. Despite the domestically granted immunity, the prospect of Pinochet's prosecution abroad raised the possibility of internal conflict within Chile and instability in the upcoming elections. Former strongmen of other states have been exiled (voluntarily or involuntarily) in order to promote domestic peace and transitions to new governments. Some fear that the ineffectiveness of any immunity for Pinochet abroad will shut off this option, thwarting efforts to obtain the benefits of peaceful transitions.

Even if worldwide recognition of Chile's wish to immunize Pinochet may not be a persuasive reason for not prosecuting him for his alleged crimes, stronger cases can be made. A new government may grant immunities to obtain national reconciliation under more democratic circumstances, as happened, for example, when the South African Truth and Reconciliation Commission was established after the transition to the new majority government. Although it was a product of political negotiations among conflicting interest groups, the process was relatively open and democratic. On the basis of investigations and public testimony by persons who confessed their crimes, including violations of international criminal law, to the commission, it was authorized to grant immunities under certain circumstances. The commission did grant such immunities to some, but hardly all, of the eligible persons in its recently issued report.<sup>38</sup> The South African Government determined that this solution best served the interests of the state and the public.

<sup>36</sup> See Tim Weiner, *Europeans, But Not U.S., Rejoice at Ruling*, N.Y. TIMES, Nov. 26, 1998, at A8.

<sup>37</sup> In Decree 2191 of April 18, 1978, Pinochet's military government issued a general amnesty to officials acting in their official capacities during the period between the coup of September 11, 1973, and March 10, 1978. Decree Law No. 2191, Diario Oficial, No. 30,042, Apr. 19, 1978, excerpted in REPORT OF THE CHILEAN NATIONAL COMMISSION, *infra*, at 89. This amnesty decree was issued two years before Pinochet left office and was upheld by the Chilean Supreme Court in a 1990 decision. Insunza Buscunan, Ivan Sergio (recurso de inaplicabilidad), Revista de Derecho y Jurisprudencia y Gaceta de los Tribunales, May-Aug. 1990, at 64 (S. Ct. Aug. 24, 1990). See Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, in 1 TRANSITIONAL JUSTICE 262, 285-86 n.77 (Neil J. Kritz ed., 1995). The Chilean Truth and Reconciliation Commission (Rettig Commission) was established by the new government in 1990. Supreme Decree No. 355, Diario Oficial, Apr. 25, 1990, reprinted in REPORT OF THE CHILEAN NATIONAL COMMISSION, *infra*, at 5. That commission issued a report on February 9, 1991. REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Phillip E. Berryman trans., 1993).

<sup>38</sup> SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION, FINAL REPORT DELIVERED TO PRESIDENT NELSON MANDELA ON OCTOBER 29, 1998 (visited Mar. 16, 1999) <<http://www.wdza.co/trc/>>. The commission was mandated by the Promotion of National Unity and Reconciliation Act 34 of 1995. The open nature of the

If it were to become broadly accepted, the reasoning of the Law Lords' decisions in the *Pinochet* case would limit the effectiveness of such grants of immunity to the territory of the granting state. That limitation will lessen the attractiveness of immunity to persons who may be guilty of such crimes.<sup>39</sup> If so, the goals sought by governments legitimately desiring national reconciliation may be harder to attain.

This limitation can be justified on the ground that violations of international criminal law constitute offenses not only against the states where the crimes were committed but also against the international community as a whole. The international interests ought not to be undermined by decisions of individual domestic governments regardless of how it is done. Thus, at times, the international interests may conflict with the domestic interests. Optimally, both kinds of interests should be taken into account through some established international process, but this issue has not yet been resolved. The ICC statute does not address the subject expressly. Lord Hutton's opinion in the House of Lords' recent second *Pinochet* decision, however, found that the ICC statute made such immunities irrelevant. Furthermore, implicit in the reasoning of all six majority members is that by definition immunity is irrelevant to an international crime that is based upon an action by a state official or a person acting under color of state authority.<sup>40</sup> If this reasoning is not generally accepted, aggressive prosecutions of some international crimes will face significant obstacles.

Because international crimes almost always occur in a political context, one cannot be certain whether the creation of the ICC was a "feel good" agreement or a genuine commitment by states to support international prosecutions of such crimes in relative independence from the political context. As mentioned above, examples abound of major violations of international criminal law whose prosecution has not been seriously pursued by any state or international body. A particularly instructive case is that of Iraq, whose citizens remain unaccused despite strong Security Council involvement, the active use of force against that country and the rather clear violations of international criminal law. While there is much apparent support for the ICC, as evidenced by the vote in Rome, its depth is unknown. We do not yet know how many of the states that voted for the statute will actually ratify and fully implement it domestically. Some important states either abstained or voted against the statute.

This caution may be bolstered by the records of the ICTY and the ICTR, which suggest that even if the ICC enjoyed virtually universal political support, its success would hardly be a foregone conclusion. The existing International Criminal Tribunals have not been unqualified successes.<sup>41</sup> In part, this record may reflect only the early years of those Tribunals, during which time logistical and procedural issues had to be resolved. Clearly, both Tribunals have made significant contributions to international criminal law and process. Greater contributions may be hoped for in the future, as suggested by the recent *Akayesu* and *Furundžija* convictions. Nevertheless, the ICTY has been thwarted in particular in bringing to justice high-level persons who have allegedly played the most important roles in the commission of the international crimes within its jurisdiction.<sup>42</sup> A more impressive record has not been achieved despite the apparent political support provided

<sup>39</sup> See Laurie Goering, *Wariness of Arrest Abroad Keeps Many in S. America*, CHICAGO TRIB., Dec. 15, 1998, at 6.

<sup>40</sup> *Pinochet III*, *supra* note 33.

<sup>41</sup> See Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AJIL 57 (1999); Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AJIL 97 (1999).

<sup>42</sup> See Judge Gabrielle Kirk McDonald, President of the International Tribunal for the Former Yugoslavia Addresses the United Nations Security Council, Press Release, ICTY Doc. JL/PIU/371-E (Dec. 8, 1998) (visited Mar. 18, 1999) <<http://www.un.org/icty/pressreal/p371-e.htm>>; Murphy, *supra* note 41, at 58-60, 75-76, 96.

by the Security Council and the presence of NATO forces in the former Yugoslavia.<sup>43</sup> The ICC will face similar problems, perhaps in more difficult situations.

For all the above reasons, if the ICC is to become a successful global court that prosecutes persons for international crimes notwithstanding the international political context, the adoption of the statute must usher in a sea change in national attitudes. Certainly, a large number of nongovernmental organizations were instrumental in reshaping the political dynamics on the subject.<sup>44</sup> Moreover, the adoption of the statute and its eventual implementation may strengthen international backing for prosecutions of international crimes. Although developments in the last year may nourish this expectation, history and the ICC negotiations suggest that the international community may not be prepared to provide the necessary support for a successful independent international prosecutor. This problem is illustrated by the refusal of the United States especially, but also other states, to approve the ICC statute.

If the United States and other important states do not support the court, it will face almost insurmountable obstacles as it seeks to prosecute persons for international crimes. The ICC will be very different from the ad hoc international criminal courts that have preceded it. This change is viewed positively by ICC supporters. The ICC does not require a special consensus for its establishment, unlike the occasional ad hoc courts that can be set up only by virtue of a specific political consensus of the most powerful states, e.g., the victorious Allies after World War II and the members of the UN Security Council in the cases of Yugoslavia and Rwanda. Once the ICC statute enters into force through the ratification of any combination of sixty states, prosecutions can be initiated by the prosecutor and a chamber of the court alone, or by reference to the prosecutor from any state party or cooperating state so long as the required nationality or territorial jurisdiction exists, or by reference from the Security Council.<sup>45</sup> Accordingly, unlike past international criminal prosecutions, an ICC prosecution may proceed without the political support of the most powerful states, or even a significant group of those states. Supporters will argue that this arrangement depoliticizes the enforcement of international criminal law. Others will argue that politics must always be considered because such criminal behavior is closely connected to difficult and highly political situations whose resolution may be incompatible with criminal prosecutions. Even though the Security Council's deferral authority under the ICC statute is designed to address this issue, the veto power makes this solution unlikely to be efficacious.<sup>46</sup>

Further compounding the obstacles the ICC will face as it tries to establish its legitimacy is the difficulty of obtaining custody of the accused and necessary evidence. The statute does obligate states parties to provide all necessary support to facilitate a prosecution, including delivery of the accused and evidence.<sup>47</sup> In many, if not most, circumstances, however, the accused are likely to be nationals of the state in which they are found or they will take refuge in a sympathetic state. The evidence may very well be located in that state. More likely than not, the crimes will have been committed in an effort to promote the policies of that state's leadership. If not, the state could prosecute the accused in its domestic courts to the virtual exclusion of the ICC.<sup>48</sup> Thus, the likelihood that the state with possession of the accused and the relevant evidence will

<sup>43</sup> See Murphy, *supra* note 41, at 60.

<sup>44</sup> See Arsanjani, *supra* note 13, at 22; Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AJIL 2, 4-5 (1999).

<sup>45</sup> ICC statute, *supra* note 1, Arts. 12-15, 125.

<sup>46</sup> *Id.*, Art. 16.

<sup>47</sup> *Id.*, Arts. 86-102.

<sup>48</sup> *Id.*, Art. 17. *E.g.*, United States v. Calley, 22 C.M.A. 534, 48 C.M.R. 19 (C.M.A. 1973).

support an ICC prosecution by delivering them to the court appears remote, absent a change in that state's leadership. The mechanisms to compel a state to cooperate, however, are limited.<sup>49</sup>

The history of the ICTY regarding this problem is directly on point. Not only have the states in which the crimes were committed refused to cooperate despite the binding obligations imposed on them by Security Council resolutions, but foreign armed forces with the power to enforce these obligations have not taken adequate action despite their authority to do so.<sup>50</sup> Similarly, despite support from Security Council resolutions and various other actions, the United States and the United Kingdom were thwarted for years in their efforts to persuade Libya to produce the persons accused of the terrorist bombing of Pan American Flight 103 over Lockerbie, Scotland; this situation may finally be resolved.<sup>51</sup> The unsuccessful efforts to capture Osama bin Laden constitute further evidence of this problem.<sup>52</sup> These examples highlight the obstacles likely to be faced as the ICC seeks to prosecute persons accused of international crimes. Overcoming them will be especially difficult in the absence of a high level of international support, particularly by the most powerful members of the international community.

An argument that has been made in favor of the ICC is that the standing court and its prosecutions will deter persons from committing international crimes in the future. This theory is open to debate. Even in the case of domestic crimes, serious questions abound regarding the deterrent effect of prosecutions and penalties; rather, the degree of deterrence, if any, depends on a multitude of factors.<sup>53</sup> The nature of the international crimes subject to ICC jurisdiction suggests that deterrence will generally be beside the point. Genocide, torture and other cruel, inhuman or degrading treatment or punishment, crimes against humanity, war crimes and aggression are usually committed under conditions in which powerful political forces are at work. Propaganda vilifying the "enemy" will be present and the prospect of victory makes deterrence based on the fear

<sup>49</sup> The ICC must have custody of the accused in order to prosecute. ICC statute, *supra* note 1, Art. 63. Failure of an obligated state to produce requested necessary evidence permits the court to draw negative inferences against the accused. *Id.*, Art. 72. A national security claim by a state, if substantiated, would exclude the use of evidence covered by the claim. *Id.* Failure of an obligated state to cooperate with the ICC may be referred to the Assembly of the Parties or to the UN Security Council (if it had referred the case to the ICC). ICC statute, *supra* note 1, Arts. 87(7), 112(2)(f). The assembly has the authority to recommend a settlement of the dispute or to refer the matter to the International Court of Justice. *Id.*, Art. 119. The statute, however, does not grant the ICJ compulsory jurisdiction. An assembly request for an advisory opinion would require the authorization of the UN General Assembly; however, the opinion would not be directly binding on the recalcitrant state. Matters referred to the ICC by the Security Council may be referred back to it by the assembly. If the controversy falls within its Chapter VII authority, the Council may mandate compliance and take appropriate enforcement actions. General international law on the breach of treaty obligations would also apply. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331, *reprinted in* 63 AJIL 875 (1969).

The ICC does have the advantage that no statute of limitations bars prosecution after a certain period of time. Thus, the risk of prosecution would never cease, making it possible for the matter to be referred to the ICC by a new government of the state in which the accused found refuge or by a state to which the accused might travel. National courts have taken differing positions on the statute of limitations issue. France applies normal statute of limitation rules. *In re Javor* and *In re Munyeshyaka*, *supra* note 27; *Pinochet v. Procureur de la République*, *supra* note 3. In contrast, a Belgian court found that international law forbids the application of statutes of limitation to such crimes. *In re Pinochet Ugarte*, *supra* note 3.

<sup>50</sup> ICTY Statute, *supra* note 5, Art. 29.

<sup>51</sup> See SC Res. 1192, UN SCOR, 53d Sess., 3920th mtg., at 1-2, UN Doc. S/RES/1192 (1998); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Lib. v. UK) (Lib. v. U.S.), 1998 ICJ REP. 9 (Feb. 27) (visited Mar. 16, 1999) <<http://www.icj-cij.org/>>; Marlise Simons, *2 Libyans Formally Charged in 1988 Pan Am Bombing*, N.Y. TIMES, Apr. 9, 1999, at 6.

<sup>52</sup> See Philip Shenon, *Taliban Says Bin Laden is Gone*, N.Y. TIMES, Feb. 18, 1999, at A13.

<sup>53</sup> See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 24-25, §1.5(4) (1986); JOHANNES ANDENAE, PUNISHMENT AND DETERRENCE (1974); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1 (1998).

of future prosecutions unlikely to influence individuals acting within that environment.<sup>54</sup> Recent events in Kosovo make this point particularly clear. NATO began its massive attack on the Federal Republic of Yugoslavia this year to protect the ethnic Albanians in Kosovo from the Republic's Serbian-controlled Government and armed forces. Notwithstanding that effort, reports indicate that the Serbs dramatically escalated the commission of international crimes against the ethnic Albanians. This took place despite the ongoing jurisdiction of the ICTY over such crimes.<sup>55</sup>

A stronger argument could be made that consistent prosecutions will eventually deter persons who may be tempted to foment the very circumstances that encourage such criminal actions. Perhaps this effect will materialize, but prosecutions of the leadership are even harder to obtain than prosecutions of lower ranking persons, as the record of the ICTY demonstrates. Even if this obstacle were overcome, the ethnic, religious, territorial and other passions that underlie most of these situations are not easily dissipated. The behavior they inspire is often the product of deeply ingrained historical events or myths.<sup>56</sup> This does not mean that progress cannot be made or that such efforts are not worthwhile. On the other hand, one should not overestimate the likelihood that the ICC will make significant progress toward minimizing the commission of international crimes.

An essential element in attracting the desirable universal support for the ICC is accommodating the legitimate interests of states. The negotiating record casts some doubt on whether this task was accomplished. While preparatory meetings based on drafts submitted by the International Law Commission were held prior to the Rome Conference, the negotiating time itself was extremely short compared to that of other major international treaty negotiations of this era. Despite the fact that numerous issues remained at the outset of the Rome Conference, a statute was produced in only one five-week diplomatic meeting and the final text was given to the negotiators on the last scheduled day. Many consider that further negotiations would have caused the text to unravel and that quick adoption was necessary to save it.<sup>57</sup> On the other hand, the statute may be the result of a rush to judgment. Further negotiations might have produced a better regime, if not a result that reflects the considered judgments of the participating states. Without doubt, there is an art to orchestrating conference negotiations and the leadership's decision may have been right. For the negotiation of a major new international institution, however, the negotiating period seemed particularly short to adequately resolve the many complex issues at stake. The chances for the ICC's success may be less than optimal if the statute does not reflect the considered judgments of the conference participants and fails to attract the strongest support possible.

If this perception is correct, the remaining difficulties must be identified and resolved. To some extent the Preparatory Commission may address these issues. There are limits, however, to what this forum may accomplish. Perhaps other mechanisms should be explored so that the remaining difficulties can be resolved and the necessary support attracted. Unfortunately, the prospects are not promising.

This situation may resemble the circumstances that existed after the adoption of the 1958 UN Convention on the Law of the Sea. As in this case, the United States forced a vote and lost overwhelmingly. By contrast, however, it supported the Convention with few exceptions. Just as the Convention was about to enter into force in 1994, the United

<sup>54</sup> See ANDENAES, *supra* note 53, at 21-22.

<sup>55</sup> See Carlotta Gall, *European Group Cites Evidence of War Crimes*, N.Y. TIMES, Apr. 24, 1999, at 6.

<sup>56</sup> Some even argue that this behavior is biologically imprinted in the human species. See Francis Fukuyama, *War and the Evolution of World Politics*, FOREIGN AFF., Sept./Oct. 1998, at 24.

<sup>57</sup> See Kirsch & Holmes, *supra* note 44, at 10.

States successfully negotiated an agreement that resolved its stated objections.<sup>58</sup> The method used to accomplish that result was indeed creative, giving hope that strategies will always be found in similar situations. Lamentably, more than four years after the conclusion of the 1994 Agreement, the United States has not ratified the 1982 Convention or the 1994 Agreement and ratification is not expected any time soon. This history may even have influenced the conduct of the Rome negotiations. In light of that precedent and other behavior that has tarnished U.S. credibility in the United Nations, the international community may be reluctant to undertake special efforts to accommodate the United States.<sup>59</sup> In this case it is unfortunate for all since U.S. support for the ICC could be critical.

In the development of international law, one must consider the positions of the most interested states. Many states that voted in favor of the ICC and otherwise support the strengthening of international criminal law have little direct interest in that law because they believe that it is not relevant to their activities. Some states, particularly those that traditionally participate in international peacekeeping operations, strongly support the ICC despite the fact that their forces may be at risk of committing crimes within the court's jurisdiction. On the other hand, other particularly concerned states oppose the ICC statute, to a greater or lesser extent. Some of them may simply be considered to be outlaw nations of limited geopolitical importance. The United States is a more serious case because its opposition seems to be largely based on a fear that its apparently lawful activities abroad may improperly or maliciously be brought before the ICC or other tribunals. In its view this risk may deter states of good will from undertaking these important activities. Israel also believes that its activities are compatible with objective interpretations of the law but that political forces may encourage unjustified prosecutions. China has always been particularly protective of activities within its territory and opposes international scrutiny; Russia may take a similar position. Some will argue that these views are either mistaken or reactionary. However, they cannot merely be dismissed, especially since they represent the thinking of some of the most powerful and directly interested states today.

Clearly, significant opposition in the decentralized international legal system is likely to rob a regime of effectiveness. In such circumstances the legitimacy of institutional mechanisms will be suspect and their pull toward compliance weak. This situation only adds to the difficulty of the ICC's task. Many of the cases likely to be brought before it could meet with severe resistance from the state whose national is the subject of an indictment. Without custody of the accused or the necessary evidence, convictions will be impossible. To become an effective institution, the ICC will need strong and widespread international support so that it can build a record of success and credibility and thus establish its legitimacy.<sup>60</sup> Consistent failures early in its life will pose grave risks to the viability of the ICC.

These risks are compounded by the fact that the crimes within the ICC's jurisdiction remain rather indeterminate, even though they are (or will be) defined in treaty

<sup>58</sup> See Jonathan I. Charney, *U.S. Provisional Application of the 1994 Deep Seabed Agreement*, 88 AJIL 705 (1994); Bernard H. Oxman, *The 1994 Agreement and the Convention*, 88 AJIL 687 (1994); Louis B. Sohn, *International Law Implications of the 1994 Agreement*, 88 AJIL 696 (1994).

<sup>59</sup> The inability of the U.S. executive branch to control the Senate's advice and consent process is a structural part of the separation of powers in the nonparliamentary U.S. system of democratic government. Senate refusal to consent to the ratification of a treaty signed or otherwise endorsed by the President is inherent in the system and not unprecedented. Nevertheless, a high rate of such failures weakens the ability of the United States to conduct international relations. This is especially troublesome because it reflects the inability of the President and the Senate to establish effective political and practical relations for the coordination of foreign policy.

<sup>60</sup> See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1986).

language. The same holds true for related procedural law. The lacunae were recognized by the ICTY and the ICTR, which, for the most part, enforce the same international criminal law in their target territories. The two Tribunals have taken actions that address questions of procedure and substantive criminal law to fill in these gaps. To the extent that the ICTY and ICTR develop good solutions that are adopted by the ICC or if the ICC Preparatory Commission is able to resolve these matters, skeptical states will be better able to determine the desirability of joining the court. To the extent that these issues remain unclear, states may be reluctant to leave the necessary clarifications to the future. Specificity is particularly important in criminal law, where a relatively high degree of certainty is normally expected, and in circumstances involving an untried tribunal. In addition, bureaucratic dynamics may encourage the ICC to maximize its authority in the face of limited international community control. The prosecutor may proceed with cases regarding situations referred by any state party. Furthermore, the prosecutor may initiate prosecutions subject only to review by a chamber of the court. It is unclear how significant that chamber's supervision will be since the court will have an interest in maintaining an active docket. Thus, exacting definitions of the crimes within the court's jurisdiction and the procedures to be followed appear necessary.

While the political obstacles faced by the ICC may be daunting, one could view this situation through a more optimistic lens. If it is established, even under uncertain circumstances, the court could play an important role in developing international criminal law for international and domestic enforcement. The mere existence of the institution, not to speak of prosecutions, might increase the prominence and legitimacy of this law. Certainly, despite the charge that the Nuremberg and Tokyo Tribunals reflected the victors' vengeance over the vanquished, they promoted the development of international criminal law. The recently established ICTY and ICTR, despite their difficulties and the fifty-year hiatus since World War II, have strengthened that law and facilitated the negotiation of the ICC statute. If handled well, the ICC may surmount its disabilities and lead the way toward the development of more effective international criminal law. As the purpose of law is to mold the behavior of its subjects in the face of some contrary predispositions, the ICC could serve that purpose by making international criminal law more efficacious both within and beyond the court.

JONATHAN I. CHARNEY

## NOTES AND COMMENTS

### STEFAN ALBRECHT RIESENFELD (1908–1999)

On February 17, 1999, Professor Stefan Riesenfeld died peacefully in Berkeley, California, at the age of ninety years. He was blessed with an encyclopedic memory and a quick and razor sharp wit. The former combined with prodigious energy and complete commitment to the scholarly life to yield one of the finest legal minds of this century. The latter combined both with the former and a deep commitment to his students to make him one of the most memorable and loved professors at the University of California at Berkeley. To this day, congregations of international lawyers, meeting almost anywhere, pause to tell their Riesenfeld story or quip. A favorite of mine is the reply he once gave to a question in class: "I can teach it to you, but I can't understand it for you." These attributes remained with him to the very end of his life. In the fall of 1998, he taught a full load of courses as usual at the Hastings College of Law and a half load at the University of California at Berkeley (thereby probably teaching more than any of his colleagues at either institution). This brief Note celebrates his life, his many contributions to the fields of international and comparative law, and his long and treasured affiliations with the American Society of International Law and this *Journal*.<sup>1</sup>

#### I.

Stefan Albrecht Riesenfeld was born on June 8, 1908, in Breslau, Germany, one of the twin sons of an academic father. Riesenfeld stated that his first memory was of sitting atop his father's shoulders watching as Kaiser Wilhelm, astride a horse and wearing polished armor, proceeded through Breslau to dedicate a hall celebrating the hundredth anniversary of the defeat of Napoleon. After the First World War, in which his father was killed, Riesenfeld studied at the renowned university in Breslau, now the University of Wrocław, Poland, which proudly feted him on his first postwar return to his birthplace in the late 1970s. Following his state examination, he presented a dissertation on the law of mutual insurance companies, for which he received his doctorate *summa cum laude* in 1930. The dissertation was published in 1932 in a famous series of legal texts edited by Berlin's Arthur Nussbaum.<sup>2</sup> During these late Weimar years, Riesenfeld practiced with a Berlin commercial firm and became a research associate of the famous Kaiser Wilhelm Institute, founded by Ernst Rabel.

As he was completing further academic studies in Milan, where he earned the *Dott. in Giur.* in 1934, he met the famous comparativist Max Radin, a member of the law faculty of the University of California at Berkeley, Boalt Hall. The Dean of Boalt Hall, Edwin Dickinson, was looking for a research associate who could work in German, Italian and

<sup>1</sup> For fuller discussions of Stefan Riesenfeld's life and scholarship, see *Stefan A. Riesenfeld*, 63 CAL. L. REV. 1381–609 (1975); IUS INTER NATIONES: Festschrift für Stefan Riesenfeld aus Anlaß seines 75. Geburtstages (Erik Jayme et al. eds., 1983); 20 HASTINGS INT'L & COMP. L. REV. 525–711 (1997); and 16 BERKELEY J. INT'L L. (1998) (issue celebrating his 90th birthday). See also the collective tribute including Professor Riesenfeld in *U.S. Law in an Era of Democratization*, 38 AM. J. COMP. L. at i (Supp. 1990), and his role as both subject and author in *DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND* (Marcus Lutter, Ernst C. Stiefel & Michael H. Hoeflich eds., 1993). From an earlier day, see his starring role in Eugene B. Morosoli, Book Review, 43 CAL. L. REV. 369, 373 (1955) (cartoon).

<sup>2</sup> DAS PROBLEM DES GEMISCHTEN RECHTSVERHÄLTNISSES IM KÖRPERSCHAFTSRECHT: UNTER BESONDERER BERÜCKSICHTIGUNG DER VERSICHERUNGSVEREINE AUF GEGENSEITIGKEIT (1932).



French. Radin, conversing in German with Riesenfeld, told him of this possibility and in the course an invitation arrived from Dickinson to work with him in California, an invitation that the onset of the Third Reich regime the year before made easy to accept. Needless to say, Dickinson was surprised to learn on Riesenfeld's arrival that he did not speak English! Radin had never mentioned that language. But young and energetic enough to wave aside the obvious handicaps, Riesenfeld asked for and received permission to enroll at Boalt while earning his living in comparative legal research, and he graduated in 1937.

He then went on to study at Harvard, which led to the J.S.D. in 1940, and to work with Felix Frankfurter, with Roscoe Pound, and then with State Attorney General Earl Warren in litigation between the states and the federal Government on title to U.S. offshore waters. In 1942 he published a prescient and influential book on fisheries regimes in public international law.<sup>3</sup> At this time he also began his academic career at the University of Minnesota, where he taught law while earning an undergraduate degree in engineering. Voluntary enlistment in the U.S. Navy and an extended tour of duty on a landing ship in the South Pacific followed—the source of some of Riesenfeld's choicest anecdotes. The juxtaposition of these events in his life was captured by Professor Harry N. Scheiber in a recent article: "while its author [in 1942] was entering the U.S. Navy to serve as an enlisted man in combat areas, the treatise appeared in print and was quickly recognized as one of the landmarks of the twentieth century in the literature of international law."<sup>4</sup>

In 1952 Riesenfeld accepted a call to Boalt Hall and the rest is California history. From 1952 until 1976, when he suffered mandatory retirement, he flourished at Berkeley and Berkeley flourished with him. Riesenfeld was elected to the Board of Editors of the *American Journal of International Law* in 1963. He was a prolific contributor to the pages of this *Journal*. He wrote eleven editorials and notes for the *Journal* and an impressive thirty-four reviews of books in six languages. His relationships with this *Journal* and the American Society of International Law were among his most valued professional associations.

After his formal separation from Berkeley in 1976, Riesenfeld took it upon himself to redefine the word "retirement." He was promptly appointed to the Hastings faculty and enjoyed continuous annual reappointments at Boalt for the rest of his life. Moreover, he immediately took up the post of Counselor for Public International Law at the U.S. Department of State where he served for most of President Carter's administration. He continued to work with the Department up to his death and twice was engaged to argue major cases before the International Court of Justice in The Hague.<sup>5</sup>

Riesenfeld wrote a storehouse of books and articles, writing first (and usually final) drafts with a pen on lined paper, bent close to the page and gnawing his knuckles.<sup>6</sup> He went to the shelves and the locked cage himself, finding everything, and remembering everything he had found, including where he had found it. His research assistants learned more by following him on these rounds than by writing drafts for other, more

<sup>3</sup> STEFAN A. RIESENFELD, *PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW* (1942).

<sup>4</sup> Harry N. Scheiber & Christopher J. Carr, *From Extended Jurisdiction to Privatization: International Law, Biology and Economics in the Marine Fisheries Debate, 1937-1976*, 16 *BERKELEY J. INT'L L.* 10, 11 n.2 (1998).

<sup>5</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), Judgment, 1984 ICJ REP. 246 (Oct. 12); *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Nov. 26). Professor Riesenfeld was also an active consultant in *Elettronica Sicula S.p.A. (ELSI)*, Judgment, 1989 ICJ REP. 15 (July 20).

<sup>6</sup> The *California Law Review* was established in 1912. Riesenfeld is the only person to have published in the 25th, 50th and 75th anniversary issues of the journal.

passive employers. Secondary citations did not substitute for primary ones, nor translations for their original versions—no matter in what language.

## II.

My friendship with Riesenfeld spanned only the last two decades of his long life. Yet even in that period, a hallmark of Riesenfeld's life was his currency—it was he who at ninety knew the latest French holdings on privacy law and he who most closely monitored the developments in Mercosur.

As the century drew to a close, however, I believe he saw that there was less appreciation of the horrors of the first half, and consequently less appreciation of the value of the hard-won transformations in international order of the second half. This is not to imply that Riesenfeld dwelled in the past; he did not. On occasion, he told stories about the past, but he did so not to draw his listeners into a remembered better time but, rather, to illuminate a conversation and problem of the present that he saw all too well. Over the last several decades, I believe he wanted the newer generations to understand that the first half of this century really happened. Riesenfeld's preference for the complexity of reality over the parsimonious simplicity of theory was in part a consequence of his belief that law and politics are not games. Indeed, although he was playful, scholarship to him was not a game, either. To be a scholar, in Riesenfeld's view, was not merely to be an academic. Nor was it to adopt the equally simplistic activism of some. Rather, it was to believe in the importance and urgency of more fully understanding our world. Law and politics were important, and simplistic theoretical filters on such complex phenomena were potentially dangerous.

The UN Charter begins: "determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow." Riesenfeld's life was tossed about by those two wars—a father was lost in the first, and the second led to the loss of one homeland and the gain of a new one, the United States. Yet, or perhaps because of these forces, Riesenfeld devoted much of his life to the goals of the Charter. He was a member of that small group of very talented international lawyers who helped take our world from the Second World War to the present. A deep respect for the individual and a strong belief in economic integration were his avenues to a better world. The first half of this century *was* real.

His many students and colleagues in practice, academia, nongovernmental organizations, governments and international organizations join with Steve Riesenfeld's wife and family in mourning the loss of this memorable man and celebrating his productive and rich life.

DAVID D. CARON\*

## CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be

\* Of the Board of Editors. This note draws, while expanding, on a tribute that I co-authored with my colleague, Richard M. Buxbaum, and that appears in volume 16 of the *Berkeley Journal of International Law* at p. 1 (1998).

published and to edit any letters printed. Letters should conform to the same format requirements as other manuscripts.

# THE CO-EDITORS IN CHIEF:

In his review of Max Hilaire's book on international law and U.S. military intervention in the Western Hemisphere (92 AJIL 586, 587 (1998)), Judge Abraham D. Sofaer states that "[t]he Guatemala, Dominican Republic, Grenada and Panama interventions *cannot be said to have victimized* the peoples of those countries," adding that, after intervening, the United States "stabilized the situations, *reestablished democratic institutions*, and left" (emphasis added).

I do not wish to express any opinion on the possible validity of this statement as regards the interventions in the Dominican Republic, Grenada and Panama. Insofar as the intervention in Guatemala is concerned, however, I regret to say that, in my considered opinion and with all due respect, Judge Sofaer's views are altogether wrong.

To begin with, there was, officially, no U.S. intervention in Guatemala. Thus, in the course of the Security Council debate on the relevant complaint by Guatemala, the representative of the United States said that "it is certainly true that the United States has no connexion whatsoever with what is taking place."<sup>1</sup> He could assert this because, as is well-known, the intervention was mainly a combination of covert operations.

Such was not at all the case with the other three interventions Judge Sofaer mentions, each of which involved *overt* action by the U.S. military.

Prior to June 27, 1954, when, believing that he could not turn back the rebellion the CIA had mounted against his government, Guatemalan President Jacobo Arbenz Guzmán resigned his office, he had held it in full conformity with the Guatemalan Constitution of 1945, under which he had been elected. Colonel Carlos Castillo Armas, whom a week later the rebellion put in his place, immediately repealed that Constitution and began, as president of a five-man military junta and soon thereafter of a military *trunvirate*, to rule on a completely *de facto* basis, exercising both executive and legislative powers. Numerous and serious human rights abuses committed during the initial months of Castillo Armas's grip on power unquestionably victimized the Guatemalan people, who during that dark period were without a constitution, a normal legislature or any kind of effective remedy against those abuses. A grotesque twist was added on October 10, 1954, when a plebiscite was held by which electors were asked whether or not they approved of having Castillo Armas stay on as president, but they were given no possibility of expressing support for any other candidate and each elector was required to cast his or her vote *publicly*. To be sure, this plebiscite confirmed, by an overwhelming majority, Castillo Armas's hold on power; but can one conclude that Guatemala was thereby endowed with "democratic institutions"? It may be added that, until the entry into force, on March 1, 1956, of a new Constitution, adopted by a constituent assembly that was anything but expeditious in carrying out its mandate, Castillo Armas continued to be Guatemala's unelected, one-man legislature (the validity of the statutes he adopted under his *de facto* powers being confirmed by the new Constitution).

It would seem, accordingly, that not only is it impossible to maintain that by its 1954 intervention the United States "reestablished democratic institutions" in Guatemala, but that it is exactly the opposite that is true. As a citizen of a country whose long years of

<sup>1</sup> UN SCOR, 9th Sess., 675th mtg., para. 159, UN Doc. S/PV.675 (1954).

internal armed conflict were to a large extent due to that intervention, I feel the need to take issue with Judge Sofaer's characterization of it.

ANA MATILDE PÉREZ KATZ

*Judge Sofaer replies:*

Guatemala has no doubt suffered at the hands of dictators, but my comment related to *military* interventions by the United States, not to the actions of Guatemalan governments, for which U.S. responsibility is necessarily a matter of dispute.

TO THE CO-EDITORS IN CHIEF:

In *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship* (92 AJIL 367, 378 (1998)), the authors state: "International lawyers have had a range of reactions to the recent surge of interest in IR theory. Some have responded, 'We thought of it first.' " The authors cite as evidence of this viewpoint an endnote in my book *Global Environmental Change and International Law: Prospects for Progress in Legal Order* (note 6 at pages 116-17). It reads, "Goldie thus introduced the concept of regimes into international law over a decade before it was introduced into the international relations literature by Ernst Haas" and references the following statement on page 97: "Although regimes were addressed initially by international law as a means of describing the prospect of legal regulation in Regulated areas,<sup>6</sup> the theory has gained prominence primarily within international relations."

To cite this endnote as evidence of a "we thought of it first" attitude among international lawyers toward the surge of interest in IR theory is incorrect and obscures the continuing interstimulation and reciprocal enrichment of the two disciplines, which the cited work documents and, I hope, reflects.

LYNNE M. JURGIELEWICZ

### THE FRANCIS DEÁK PRIZE

The Board of Editors is pleased to announce that the Francis Deák Prize for 1999 was awarded to Professor Benedict Kingsbury of the New York University School of Law for his article entitled "*Indigenous Peoples*" in *International Law: A Constructivist Approach to the Asian Controversy*, which appeared in the July 1998 issue.

The prize was established by Philip Cohen in memory of Dr. Francis Deák, an international legal scholar and lifelong member of the American Society of International Law, to honor a younger author who has published a meritorious contribution to international legal scholarship in the *American Journal*. The *Journal* notes with sadness the death of Mr. Cohen in September 1998 and wishes to thank his son, David Cohen, President of Oceana Publications, for generously continuing the tradition begun by his father.

# CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY SEAN D. MURPHY\*

## INTERNATIONAL LAW IN GENERAL

### *Promoting the Rule of Law in U.S. Foreign Policy*

In a speech at the University of Washington School of Law on October 28, 1998, U.S. Secretary of State Madeleine K. Albright discussed the relevance of the rule of law to U.S. foreign policy:

Law is a theme that ties together the broad goals of our foreign policy. It is at the heart of virtually everything we do at the Department of State—from the negotiation of arms control treaties to seeking a fair deal for our salmon fishermen to guaranteeing that the intellectual property rights of our software companies are protected. And one of the great lessons we have learned is that the rule of law and global prosperity go hand in hand.

. . . . .

... [T]he global financial crisis requires that we focus not only on the rules governing international trade but also on the rules governing the regulation and management of economies within nations. For it is clear that an insufficient commitment to the rule of law in key countries was a major contributor to the current crisis.

In this context, the rule of law means having governments that answer to voters. It means having financial institutions that are accountable to customers, stockholders, and regulators. It means having contracts that are enforceable in courts that are impartial. It means having a system for collective taxes that is effective and fair.

. . . . .

The United States relies on the rule of law to help build a world that is safer and more secure. But we are also prepared, through our armed forces, to protect our citizens and our vital interests should the rule of law break down. A case in point is the battle against international terror.

. . . . .

... Although we do not publicize it, we often use law enforcement and other assets to disrupt and prevent planned terrorist attacks. We use the courts to bring suspected terrorists before the bar of justice, as we have moved to do in the case of Pan Am 103 and as we have done in the Nairobi bombing. And around the world, we are pressing other nations to arrest or expel terrorists, shut down their businesses, and deny them safe haven. . . .

. . . . .

Almost exactly 50 years ago, representatives from nations around the world came together to draft and sign the Universal Declaration of Human Rights. Since its unveiling, the Declaration has been incorporated or referred to in dozens of national constitutions, and its principles have been reaffirmed many times. It is a

\* George Washington University School of Law.

centerpiece of the argument we make today that respect for human rights is the obligation not just of some but of every government.

. . . .

A centerpiece of our efforts has been our strong backing for the international war crimes tribunals for Rwanda and the Balkans. . . .

We must not forget. The killings in Bosnia and Rwanda were not the inevitable result of ethnic grievances. They were not the products of drunken excess or battlefield passions. On the contrary, they were carefully planned and ruthlessly orchestrated by ambitious men seeking expanded power.

We all have a stake in seeing that these individuals are brought to justice. We all have a stake in establishing a precedent that will deter future atrocities. And we all have an interest in seeing that those who consider rape just another tactic of war are held accountable for their crimes.

. . . .

Among the most basic rights spelled out in the Universal Declaration is the right to take part in government either directly or through freely chosen representatives. Article 21 provides that "the will of the people shall be the basis of the authority of government."

The promotion of this right is a top priority of our foreign policy. We know that democracy is not an import; it must find its roots internally. But outsiders can help nourish those roots by backing efforts to build democratic institutions.

. . . .

Although the specifics of our approach to the promotion of democracy and law will vary with the country, the fundamental goals are the same. We seek to encourage where we can the development of democratic institutions and practices. Some fault these efforts as unrealistic in their premise that democracy can take hold in less developed nations, or "hegemonic" in trying to impose democratic values.

In truth, we understand well that democracy must emerge from the desire of individuals to participate in the decisions that shape their lives. But we see this desire in all countries. And there is no better way for us to show respect for others than to support their right to shape their own destinies and select their own leaders. This is why, unlike dictatorship, democracy is never an imposition; it is, by definition, always a choice.<sup>1</sup>

#### LEGAL REGULATION OF USE OF FORCE

##### *Missile Attacks against Iraq*

In the aftermath of the expulsion of Iraqi armed forces from Kuwait in 1991 by a coalition acting under the authority of the Security Council, Iraq accepted the terms of a UN cease-fire resolution, Resolution 687<sup>1</sup> of April 3, 1991. Among other things, Resolution 687 provided that, prior to the lifting of economic sanctions on Iraq, it must destroy or render harmless, under international supervision, all nuclear, chemical, and biological weapons, all ballistic missiles with a range of greater than 150 kilometers, and associated materials and facilities. Further, Resolution 687 called for the establishment of a special commission charged with the on-site inspection (and, when appropriate, destruction) of Iraq's biological, chemical, and missile capabilities, at locations desig-

<sup>1</sup> Madeleine K. Albright, *U.S. Efforts to Promote the Rule of Law*, U.S. DEP'T ST. DISPATCH, Nov. 1998, at 6.

<sup>1</sup> SC Res. 687 (Apr. 3, 1993). For Iraq's acceptance, see Identical Letters Dated 6 April 1991 from Iraq to the Secretary-General and the President of the Security Council, UN Doc. S/22456.

nated by Iraq or by the special commission. That commission, formally known as the UN Special Commission (UNSCOM), was established as a subsidiary organ of the Security Council.<sup>2</sup> Its members are drawn from a wide variety of countries and are supported by about 120 technical experts, analysts, data processors, logistics experts, and administrative staff. UNSCOM first operated under Executive Chairman Rolf Ekéus (Sweden) and then Executive Chairman Richard Butler (Australia). Similar oversight and destruction of Iraq's nuclear capabilities were entrusted by the Security Council in Resolution 687 to the International Atomic Energy Agency (IAEA).

Through an exchange of letters in May 1991, the UN Secretary-General, the UNSCOM Executive Chairman, and the Iraqi Foreign Minister agreed on the modalities for the commission's inspections. Those modalities included unrestricted freedom of movement without advance notice to the Iraqi Government.<sup>3</sup> Over the course of 1991–1998, UNSCOM enjoyed mixed success. During that period, it successfully supervised the destruction of 48 operational long-range missiles, 14 conventional missile warheads, 6 operational mobile launchers, 28 operational fixed launch pads, 32 fixed launch pads under construction, 30 missile chemical warheads, 38,500 filled and empty chemical munitions, 690 tons of chemical weapons agents, more than 3,000 tons of precursor chemicals, 426 pieces of chemical weapons production equipment and 91 pieces of related analytical equipment, an entire biological weapons facility (at Al-Hakam), and a variety of biological weapons production equipment and materials.<sup>4</sup> Iraq, however, repeatedly denied the inspection teams access to some facilities, leading to the belief within UNSCOM, and by many states, that it continued to have significant proscribed biological and chemical weapons capability.<sup>5</sup> For its part, Iraq protested what it regarded as an intrusion into its national sovereignty, often charging that the inspections were inappropriately dominated by the United States.

Iraqi resistance so impaired inspection activities that in early 1998 the United States announced that it was prepared to use military force to compel Iraqi compliance. UN Secretary-General Kofi Annan traveled to Baghdad and secured a renewed commitment from Iraq of its compliance, subject to the conclusion of an arrangement whereby a special group of diplomatic observers would join UNSCOM for the inspection of eight presidential sites.<sup>6</sup> Thereafter, Iraq resumed limited cooperation.

In June 1998, UNSCOM and Iraqi officials agreed on a schedule for bringing to closure outstanding issues regarding biological weapons, chemical weapons, and missiles. However, according to UNSCOM, Iraq failed during June–July to provide necessary information and documents. In early August 1998, Executive Chairman Butler met with Iraqi

<sup>2</sup> SC Res. 699 (June 17, 1991).

<sup>3</sup> For a summary of UNSCOM's rights and duties, see Plan for the Implementation of Relevant Parts of Section C of Security Council Resolution 687 (1991), Report of the Secretary-General, UN Doc. S/22614.

<sup>4</sup> Those interested in the activities of UNSCOM will wish to consult the periodic reports submitted by the Executive Chairman to the Secretary-General and transmitted by the Secretary-General to the Security Council. See, e.g., Note by the Secretary-General, UN Doc. S/1998/920 (1998). Activities of UNSCOM are also recorded on the Internet at (<http://www.un.org/depts/unscom>).

<sup>5</sup> See *What the Inspectors Can't Find and Why They Can't Find It*, N.Y. TIMES, Dec. 20, 1998, at WK5 (table compiled by a nongovernmental research group that tracks the spread of weapons of mass destruction). For an account of UNSCOM's difficulties, largely based on interviews with an UNSCOM Chief Inspector, of U.S. nationality, who resigned in protest in August 1998, see Barton Gellman, *A Futile Game of Hide and Seek*, WASH. POST, Oct. 11, 1998, at A1; Barton Gellman, *Arms Inspectors 'Shake the Tree'*, WASH. POST, Oct. 12, 1998, at A1; see also SCOTT RITTER, *ENDGAME: SOLVING THE IRAQ PROBLEM—ONCE AND FOR ALL* (1999).

<sup>6</sup> See Memorandum of Understanding between the United Nations and the Republic of Iraq (Feb. 23, 1998), attachment to Letter Dated 25 February 1998 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1998/166, reprinted in 37 ILM 501 (1998). The memorandum was endorsed by the Security Council. SC Res. 1154 (Mar. 2, 1998). For a discussion of the legality of the United States' threat to use force in early 1998, see 92 AJIL 724 (1998).

officials in Baghdad both to note this lack of cooperation and to propose an intensive schedule for at least bringing to closure by October issues regarding chemical weapons and missiles.

On August 5, 1998, Iraq called upon the Security Council to lift economic sanctions. Further, Iraq stated that pending Security Council action on its request, it was suspending cooperation with UNSCOM on all disarmament activities and limiting monitoring and verification activities.<sup>7</sup> On August 12, the UNSCOM Executive Chairman informed the Security Council that Iraq's restrictions effectively prevented any spot inspections.<sup>8</sup> The Security Council condemned Iraq's decision and suspended the review it conducted every sixty days on whether to lift sanctions.<sup>9</sup> It also indicated that were Iraq to resume cooperation, it would conduct a comprehensive review of Iraq's overall compliance. Iraq, however, informed the Secretary-General that, in its view, it had fully complied with the Security Council's resolutions and that sanctions should be lifted immediately.<sup>10</sup>

On October 31, 1998, Iraq formally halted all cooperation with UNSCOM.<sup>11</sup> In response, the United States embarked on an intense diplomatic initiative with allies in the Middle East and Europe to promote support for all possible options, including the use of force, to obtain Iraqi compliance.<sup>12</sup> On November 5, the Security Council condemned Iraq's decision and demanded that it immediately and unconditionally resume cooperation with UNSCOM (the Security Council did not address the issue of use of force by other states against Iraq).<sup>13</sup> At the meeting of the Security Council, the United Kingdom representative warned that legal authorization for states to use force against Iraq might be revived if there were a serious breach by Iraq of its obligations under Resolution 687; the U.S. representative simply stated that the United States had sufficient authority to use force.<sup>14</sup>

Also on November 5, President William J. Clinton warned that Iraq's noncompliance was "totally unacceptable."<sup>15</sup> By mid-November, the United States had assembled a large force of military aircraft and vessels in the Persian Gulf region, including an aircraft carrier and twenty-two other combat ships.<sup>16</sup> Iraq's obstinacy irritated states that might otherwise have opposed the use of force; eight Arab states, including Egypt, Saudi Arabia, and Syria, issued a statement warning Iraq that it would be to blame for the consequences

<sup>7</sup> See Letter Dated 5 August 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of Iraq to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/718.

<sup>8</sup> Letter Dated 12 August 1998 from the Executive Chairman of the Special Commission Addressed to the President of the Security Council, UN Doc. S/1998/767.

<sup>9</sup> SC Res. 1194 (Sept. 9, 1998).

<sup>10</sup> Barbara Crossette, *Iraq Says It Won't Let U.N. Resume Spot Arms Checks*, N.Y. TIMES, Sept. 29, 1998, at A11.

<sup>11</sup> See Letter Dated 31 October 1998 from the Deputy Executive Chairman of the Special Commission Addressed to the President of the Security Council, UN Doc. S/1998/1023; Letter Dated 2 November 1998 from the Executive Chairman of the Special Commission Addressed to the President of the Security Council, UN Doc. S/1998/1032; Barbara Crossette, *In New Challenge to the U.N., Iraq Halts Arms Monitoring*, N.Y. TIMES, Nov. 1, 1998, §1, at 1; John M. Goshko & Howard Schneider, *Iraq Halts All Work by U.N. Inspectors*, WASH. POST, Nov. 1, 1998, at A1.

<sup>12</sup> Bradley Graham, *Cohen Seeks Cooperation from Saudis*, WASH. POST, Nov. 4, 1998, at A21; Steven Lee Myers, *U.S. Moves Ahead with Preparations for Strikes on Iraq but Sets No Deadline*, N.Y. TIMES, Nov. 6, 1998, at A8; Steven Lee Myers, *U.S. Works to Win Allies' Support for Using Force Against Iraq*, N.Y. TIMES, Nov. 5, 1998, at A16; Howard Schneider, *Cohen Bids for Allies in New Iraqi Impasse*, WASH. POST, Nov. 5, 1998, at A56.

<sup>13</sup> SC Res. 1205 (Nov. 5, 1998); see Barbara Crossette, *U.N., Avoiding Talk of Force, Criticizes Iraq on Arms Team*, N.Y. TIMES, Nov. 6, 1998, at A1.

<sup>14</sup> UN Doc. S/PV.3939 (Nov. 5, 1998).

<sup>15</sup> Statement on Iraq's Noncompliance with United Nations Resolutions, 34 WEEKLY COMP. PRES. DOC. 2259 (Nov. 9, 1998).

<sup>16</sup> Bradley Graham & John M. Goshko, *More Forces Sent to Gulf as Clinton Warns Iraq*, WASH. POST, Nov. 12, 1998, at A1; Howard Schneider, *Baghdad Stiffens as U.S. Air Armada Assembles Nearby*, WASH. POST, Nov. 13, 1998, at A1; *U.S. Forces in the Gulf Region*, WASH. POST, Nov. 12, 1998, at A29.



of defying the United Nations.<sup>17</sup> On November 15, the United States launched aircraft as the first stage of a massive missile attack against Iraq. On the same day, however, Iraq transmitted to the United Nations several increasingly firm commitments accepting resumption of UNSCOM inspections.<sup>18</sup> Consequently, the United States recalled the aircraft and aborted a planned missile strike.<sup>19</sup> Although there was initially some concern as to whether Iraq's acceptance was unconditional,<sup>20</sup> President Clinton stated on November 15:

Last night Iraq agreed to meet the demands of the international community to cooperate fully with the United Nations weapons inspectors. Iraq committed to unconditional compliance. It rescinded its decisions of August and October to end cooperation with the inspectors. It withdrew its objectionable conditions. In short, Iraq accepted its obligation to permit all activities of the weapons inspectors, UNSCOM and the I.A.E.A., to resume in accordance with the relevant resolutions of the U.N. Security Council.

The United States, together with Great Britain and with the support of our friends and allies around the world, was poised to act militarily if Iraq had not reversed course. Our willingness to strike, together with the overwhelming weight of world opinion, produced the outcome we preferred: Saddam Hussein reversing course, letting the inspectors go back to work without restrictions or conditions.<sup>21</sup>

Efforts by UNSCOM to resume its full slate of activities in Iraq, however, encountered continuing resistance during the remainder of November and early December 1998.<sup>22</sup> On December 15, Executive Chairman Butler reported to the Security Council that the commission "is not able to conduct the substantive disarmament work mandated to it by the Security Council."<sup>23</sup>

The next day, the United States and the United Kingdom commenced a seventy-hour missile and aircraft bombing campaign against approximately a hundred sites in Iraq: military command centers, intelligence and communications facilities, missile factories, airfields, an oil refinery allegedly used to evade UN economic sanctions, and the headquarters and bases of the Iraqi Republican Guard.<sup>24</sup> The missile campaign consisted of cruise missiles launched from U.S. Navy vessels in the Persian Gulf and from B-52

<sup>17</sup> Barbara Crossette, *As Tension Grows, Few Voices at U.N. Speak Up for Iraq*, N.Y. TIMES, Nov. 13, 1998, at A1.

<sup>18</sup> Security Council Notes Agreement of Iraq to Rescind Earlier Decisions, Allow Resumption of UNSCOM and IAEA Activities, UN Press Release SC/6596-IK/258 (Nov. 15, 1998); Letter Dated 14 November 1998 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, UN Doc. S/1998/1078; Letter Dated 14 November 1998 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/1079.

<sup>19</sup> Bradley Graham & Howard Schneider, *U.S. Launches, Then Aborts Airstrikes After Iraq Relents on U.N. Inspections*, WASH. POST, Nov. 15, 1998, at A1; Philip Shenon & Steven Lee Myers, *U.S. Says It Was Just Hours Away from Starting Attack Against Iraq*, N.Y. TIMES, Nov. 15, 1998, at 1.

<sup>20</sup> Compare Barbara Crossette, *Iraq Offers Steps to Avoid Attack; U.S. Rejects Plan*, N.Y. TIMES, Nov. 15, 1998, at 1, with Steven Erlanger, *Clinton Accepts Iraq's Promise to Allow Weapons Inspections*, N.Y. TIMES, Nov. 16, 1998, at A1.

<sup>21</sup> Remarks on the Situation in Iraq and an Exchange with Reporters, 34 WEEKLY COMP. PRES. DOC. 2319 (Nov. 25, 1998).

<sup>22</sup> William J. Broad & Judith Miller, *Iraq Said to Hide Deadly Germ Agents*, N.Y. TIMES, Dec. 17, 1998, at A15; Barbara Crossette, *Iraq Again Hindering Inspections*, U.N. TOLD, N.Y. TIMES, Dec. 11, 1998, at A6; Barbara Crossette, *Iraq Ratchets Up its New Defiance Over Inspections*, N.Y. TIMES, Nov. 23, 1998, at A1; John M. Goshko & Nora Boustany, *U.N. Arms Inspectors Blocked at Iraqi Site*, WASH. POST, Dec. 10, 1998, at A51.

<sup>23</sup> Letter Dated 15 December 1998 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1998/1172 (transmitting UNSCOM and IAEA reports); Barton Gellman, *Iraq Hasn't Cooperated, Arms Inspector Reports*, WASH. POST, Dec. 16, 1998, at A1. For Iraq's views, see Letter Dated 15 December from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1998/1173 (1998) (transmitting letter from Iraq). UNSCOM withdrew its personnel from Iraq on December 16.

<sup>24</sup> Francis X. Clines & Steven Lee Myers, *Impeachment Vote in House Delayed as Clinton Launches Iraq Air Strike, Calling Military Need to Move Swiftly*, N.Y. TIMES, Dec. 17, 1998, at A1; Steven Lee Myers, *U.S. and Britain End Raids on Iraq, Calling Mission a Success*, N.Y. TIMES, Dec. 20, 1998, at 1.

bombers operating out of the UK island of Diego Garcia in the Indian Ocean. The bombing campaign consisted of bombers and fighters launched from the U.S. aircraft carrier *Enterprise* and from bases in the region.<sup>25</sup> In all, approximately six hundred bombs and 390 cruise missiles were fired against ninety-seven military targets.<sup>26</sup>

In a nationwide televised address, President Clinton explained the reasons for the attack as follows:

The United States has patiently worked to preserve UNSCOM, as Iraq has sought to avoid its obligation to cooperate with the inspectors. On occasion, we've had to threaten military force, and Saddam has backed down. Faced with Saddam's latest act of defiance in late October, we built intensive diplomatic pressure on Iraq, backed by overwhelming military force in the region. The U.N. Security Council voted 15 to zero to condemn Saddam's actions and to demand that he immediately come into compliance. Eight Arab nations—Egypt, Syria, Saudi Arabia, Kuwait, Bahrain, Qatar, United Arab Emirates, and Oman—warned that Iraq alone would bear the responsibility for the consequences of defying the U.N.

When Saddam still failed to comply we prepared to act militarily. It was only then, at the last possible moment, that Iraq backed down. It pledged to the U.N. that it had made, and I quote, "a clear and unconditional decision to resume cooperation with the weapons inspectors." I decided then to call off the attack, with our airplanes already in the air because Saddam had given in to our demands. I concluded then that the right thing to do was to use restraint and give Saddam one last chance to prove his willingness to cooperate.

I made it very clear at that time what "unconditional cooperation" meant, based on existing U.N. resolutions and Iraq's own commitments. And along with Prime Minister Blair of Great Britain, I made it equally clear that if Saddam failed to cooperate fully, we would be prepared to act without delay, diplomacy or warning.

Now, over the past three weeks, the U.N. weapons inspectors have carried out their plan for testing Iraq's cooperation. The testing period ended this weekend, and last night, UNSCOM's Chairman, Richard Butler, reported the results to U.N. Secretary-General Annan. The conclusions are stark, sobering and profoundly disturbing.

In four out of the five categories set forth, Iraq has failed to cooperate. Indeed, it actually has placed new restrictions on the inspections. . . .

. . . .

This situation presents a clear and present danger to the stability of the Persian Gulf and the safety of people everywhere. The international community gave Saddam one last chance to resume cooperation with the weapons inspectors. Saddam has failed to seize the chance.

And so we had to act, and act now. Let me explain why.

First, without a strong inspections system, Iraq would be free to retain and begin to rebuild its chemical, biological, and nuclear weapons programs in months, not years.

Second, if Saddam can cripple the weapons inspections system and get away with it, he would conclude that the international community, led by the United States,

<sup>25</sup> For a preliminary compilation of the types of sites targeted and an assessment of the damage inflicted (based on U.S. Department of Defense sources, BBC reports, and wire reports), see *Four Nights of Airstrikes*, WASH. POST, Dec. 20, 1998, at A48.

<sup>26</sup> Dana Priest, *U.S. Commander Unsure of How Long Iraq Will Need to Rebuild*, WASH. POST, Dec. 22, 1998, at A31.

has simply lost its will. He will surmise that he has free rein to rebuild his arsenal of destruction. And some day, make no mistake, he will use it again, as he has in the past.

Third, in halting our air strikes in November, I gave Saddam a chance, not a license. If we turn our backs on his defiance, the credibility of U.S. power as a check against Saddam will be destroyed. We will not only have allowed Saddam to shatter the inspections system that controls his weapons of mass destruction program; we also will have fatally undercut the fear of force that stops Saddam from acting to gain domination in the region.

That is why . . . I have ordered a strong, sustained series of air strikes against Iraq. They are designed to degrade Saddam's capacity to develop and deliver weapons of mass destruction, and to degrade his ability to threaten his neighbors. At the same time, we are delivering a powerful message to Saddam: If you act recklessly, you will pay a heavy price.<sup>27</sup>

Although it was not publicly admitted, senior civilian and military officials reportedly stated that a central aim was to weaken the regime of President Saddam Hussein by attacking Republican Guard divisions deemed essential in protecting him from an armed uprising.<sup>28</sup>

The air strikes began the same day the U.S. House of Representatives was scheduled to vote on whether to impeach President Clinton for actions connected to his relationship with a White House intern. In his remarks, President Clinton explained the timing of the attack as based on the need to respond swiftly to Executive Chairman Butler's report—so as to catch Iraq off guard and avoid initiating the attack during Ramadan.<sup>29</sup> Nevertheless, some U.S. political leaders expressed skepticism about the timing of the attack.<sup>30</sup>

At an emergency meeting of the Security Council, Iraq's Permanent Representative to the United Nations, Nizar Hamdoun, characterized the attack as "aggression" and asserted that the United States had "once again flouted" international law.<sup>31</sup> Iraq's Deputy Prime Minister stated that some 62 members of the Iraqi military, including 38 members of the Republican Guard, were killed, and 180 were wounded,<sup>32</sup> but the U.S. Chairman of the Joint Chiefs of Staff, citing unconfirmed intelligence reports, claimed that between six hundred and sixteen hundred members of the Republican Guard were killed.<sup>33</sup>

Foreign reaction to the air strikes was mixed. The United Kingdom supported the action, contributing its own fighter jets and reconnaissance planes. Kuwait and Oman permitted use of their bases by U.S. and UK strike aircraft (Turkey did not). Bahrain, Qatar, Saudi Arabia, and the United Arab Emirates allowed support operations, including airspace clearance and takeoff privileges for the refueling planes that serviced the strike aircraft.<sup>34</sup> Australia, Canada, Denmark, the European Union, Germany, Japan, New Zealand, the Netherlands, Norway, Spain, and South Korea voiced their support.

<sup>27</sup> Address to the Nation Announcing Military Strikes on Iraq, 34 WEEKLY COMP. PRES. DOC. 2494, 2494-96 (Dec. 21, 1998) [hereinafter Address].

<sup>28</sup> Barton Gellman & Vernon Loeb, *A Major Aim: Kill Saddam's 'Palace Guard'*, WASH. POST, Dec. 19, 1998, at A1.

<sup>29</sup> Address, *supra* note 27, at 2496.

<sup>30</sup> Eric Schmitt, *G.O.P. Splits Bitterly Over Timing of Assault*, N.Y. TIMES, Dec. 17, 1998, at A1.

<sup>31</sup> Howard Schneider, *As Key Sites Lie in Ruins, a Durable Saddam Declares 'Victory'*, WASH. POST, Dec. 21, 1998, at A1.

<sup>32</sup> Priest, *supra* note 26.

<sup>33</sup> Steven Lee Myers, *Iraq Damage More Severe Than Reported, Pentagon Says*, N.Y. TIMES, Jan. 9, 1999, at A3.

<sup>34</sup> Peter Finn, *End of Raids Spurs Conflicting Arab Reactions*, WASH. POST, Dec. 21, 1998, at A24; Douglas Jehl, *U.S. Fighters in Saudi Arabia Grounded*, N.Y. TIMES, Dec. 19, 1998, at A9; Douglas Jehl, *Saudis Admit Restricting U.S. Warplanes in Iraq*, N.Y. TIMES, Mar. 22, 1999, at A6.

China, France, and Russia, however, sharply criticized the action, primarily because it was undertaken before the matter was debated at the Security Council.<sup>35</sup> Those three permanent members of the Security Council called for ending the oil embargo on Iraq and recasting or disbanding UNSCOM.<sup>36</sup> Russia declared the attack an unprovoked act of force that violated principles of international law and the UN Charter.<sup>37</sup>

Arab newspapers were critical of the attack, but Palestine Authority Chairman Yasir Arafat and the leaders of most Arab governments were initially silent, apparently reflecting the deep anger of many major Arab leaders against President Saddam. Lebanon, however, condemned the attack as "a collective punishment and flagrant violation of all international charters on human rights," and the Secretary-General of the Arab League called it "an act of aggression against an Arab country that was trying to implement and comply with UN Security Council resolutions."<sup>38</sup> Several peaceful protests occurred in the Middle East, but in Syria a violent mob assaulted the U.S. and UK Embassies and the U.S. Ambassador's residence.<sup>39</sup> Nevertheless, divisions among Arab states led to the postponement of a December 28 Arab League meeting set up to discuss the attacks. The postponement prompted a strong protest from Iraq<sup>40</sup> and a call for the people of some Arab states to rise up against their leaders—which in turn led to bitter denunciations of Iraq by some Arab nations.<sup>41</sup> When the meeting was held in January 1999, Iraqi representatives walked out once it became clear that the Arab League would issue a statement demanding that Iraq renounce "provocations" against its neighbors and that it comply with all UN resolutions before economic sanctions were lifted.<sup>42</sup>

In a nationwide address on December 19, President Clinton announced the conclusion of the strike, stating that it had inflicted "significant damage on Saddam's weapons of mass destruction programs, on the command structures that direct and protect that capability, and on his military and security infrastructure."<sup>43</sup> He then outlined the U.S. strategy for dealing with Iraq in the future:

First, we will maintain a strong military presence in the area, and we will remain ready to use it if Saddam tries to rebuild his weapons of mass destruction, strikes out at his neighbors, challenges allied aircraft or moves against the Kurds. We also will continue to enforce no-fly zones in the north and from the southern suburbs of Baghdad to the Kuwaiti border.

Second, we will sustain what have been among the most extensive sanctions in U.N. history. To date, they have cost Saddam more than \$120 billion, resources that would have gone toward rebuilding his military. At the same time, we will support a continuation of the oil-for-food program, which generates more than \$10 billion a

<sup>35</sup> William Drozdiak, *Nations Find Fault with Airstrikes*, WASH. POST, Dec. 17, 1998, at A29; Steven Erlanger, *U.S. Decision to Act Fast, and Then Search for Support, Angers Some Allies*, N.Y. TIMES, Dec. 17, 1998, at A14; Thomas W. Lippman & William Drozdiak, *America's Allies Give Support to Attack*, WASH. POST, Dec. 18, 1998, at A55.

<sup>36</sup> Barton Gellman, *Iraq Inspections, Embargo in Danger at U.N. Council*, WASH. POST, Dec. 22, 1998, at A25.

<sup>37</sup> UN Doc. S/PV.3955 (Dec. 16, 1998).

<sup>38</sup> Lee Hockstader, *Arab States' Reaction Is Restrained*, WASH. POST, Dec. 18, 1998, at A55; Thomas W. Lippman, *Arab Nations Are Quiet, but U.S. Claims Tacit Support*, WASH. POST, Dec. 17, 1998, at A30.

<sup>39</sup> Daniel Williams, *Protests, Violence Flare in Arab World*, WASH. POST, Dec. 20, 1998, at A45.

<sup>40</sup> *Iraq Turns Its Wrath on Arab League*, WASH. POST, Jan. 1, 1999, at A28.

<sup>41</sup> Douglas Jehl, *Iraqi's Angry Call for Revolt Splits the Arab Nations*, N.Y. TIMES, Jan. 6, 1999, at A1; Howard Schneider, *Saddam, Iraq Further Isolated as Arab States Step Up Criticism*, WASH. POST, Jan. 7, 1999, at A20.

<sup>42</sup> Douglas Jehl, *As Arab League Urges Iraqis to Obey the U.N., They Walk Out of the Meeting*, N.Y. TIMES, Jan. 25, 1999, at A10.

<sup>43</sup> Address to the Nation on Completion of Military Strikes in Iraq, 34 WEEKLY COMP. PRES. DOC. 2516, 2516-18 (Dec. 28, 1998). Damage assessments were principally derived from U.S. aerial or satellite imagery, augmented by information obtained largely from Iraqi opposition groups operating in Iraq. See Vernon Loeb, *U.S. Officials Cite Iraqi Opposition Reports to Show Weakened Saddam*, WASH. POST, Jan. 18, 1999, at A6; Steven Lee Myers, *Iraq Damage More Severe Than Reported, Pentagon Says*, N.Y. TIMES, Jan. 9, 1999, at A3.

year for food, medicine and other critical humanitarian supplies for the Iraqi people. We will insist that Iraq's oil be used for food, not tanks.

Third, we would welcome the return of UNSCOM and the International Atomic Energy Agency back into Iraq to pursue their mandate from the United Nations—provided that Iraq first takes concrete, affirmative, and demonstrable actions to show that it will fully cooperate with the inspectors. But if UNSCOM is not allowed to resume its work on a regular basis, we will remain vigilant and prepared to use force if we see that Iraq is rebuilding its weapons programs.

Now, over the long term, the best way to end the threat that Saddam poses to his own people in the region is for Iraq to have a different government. We will intensify our engagement with the Iraqi opposition groups, prudently and effectively. We will work with Radio Free Iraq to help news and information flow freely to the country. And we will stand ready to help a new leadership in Baghdad that abides by its international commitments and respects the rights of its own people.

The U.S. National Security Adviser, Samuel R. Berger, stated on December 23 that U.S. policy on Iraq was limited to two outcomes: total Iraqi compliance with UN Security Council resolutions or the downfall of President Saddam.<sup>44</sup>

The no-fly zones referred to by President Clinton in his December 19 address were established by France, the United Kingdom, and the United States to protect Iraqi Kurds from repression by President Saddam's forces. The Kurdish zone was organized in April 1991 in northern Iraq (above the 36th parallel); in August 1992 an area in southern Iraq was designated a no-fly zone to protect Iraqi Shiites (initially below the 32nd parallel; the area was enlarged in 1996 to below the 33rd parallel). No express authority for patrolling these no-fly zones appears in Security Council resolutions. On December 28 and 30, 1998, U.S. aircraft patrolling the no-fly zone in northern Iraq attacked and destroyed two Iraqi air defense batteries after they opened fire on the aircraft (the previous such incident had occurred in 1996).<sup>45</sup> In a nationwide broadcast on January 3, 1999,<sup>46</sup> President Saddam reiterated Iraq's view that the no-fly zones were unlawful, and Iraq threatened retaliation against neighboring states from which the aircraft were launched.<sup>47</sup> Nevertheless, U.S. and UK aircraft continued to patrol the zones and, on occasion, to attack Iraqi air defense facilities.<sup>48</sup>

Efforts to reach agreement on the return of UNSCOM to Iraq were severely damaged by revelations in early January 1999 that it had closely cooperated with the U.S. Government in intelligence operations in Iraq. Iraq had long argued that it should not be subjected to UNSCOM monitoring because that body was a "tool" of U.S. intelligence activities. On January 6, 1999, the U.S. Government admitted that its intelligence operatives had worked under cover on the inspection teams.<sup>49</sup> While the United States characterized these operations as assisting the commission in obtaining information on concealment of weapons of mass destruction, a U.S. electronic system planted in March

<sup>44</sup> Thomas W. Lippman, *Two Options for Iraq in U.S. Policy*, WASH. POST, Dec. 24, 1998, at A14.

<sup>45</sup> Barton Gellman, *U.S. Planes Hit Iraqi Site After Missile Attack*, WASH. POST, Dec. 29, 1998, at A1; Steven Lee Myers, *F-16's Attack Iraqis After Missiles Are Fired at Allied Jets*, N.Y. TIMES, Dec. 31, 1998, at A3.

<sup>46</sup> *Iraqi Ruler Says No-Flight Zones Are Illegal*, N.Y. TIMES, Jan. 4, 1999, at A4; see also Letter Dated 13 February 1999 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc. S/1999/153.

<sup>47</sup> Iraq threatened retaliation against Kuwait, Saudi Arabia, and Turkey. Howard Schneider, *Iraq Threatens Border Attacks*, WASH. POST, Feb. 16, 1999, at A11; see also Stephen Kinzer, *Turkey Reassures U.S. on Air Base*, N.Y. TIMES, Feb. 13, 1999, at A5.

<sup>48</sup> Steven Lee Myers, *U.S. Presses Air Attacks on Iraq In a Low-Level War of Attrition*, N.Y. TIMES, Feb. 3, 1999, at A1. In one U.S. attack on Iraqi air defenses, errant missile(s) apparently landed in residential areas, killing several Iraqi civilians. Bradley Graham, *Strikes Hit Civilians, Iraq Says*, WASH. POST, Jan. 26, 1999, at A1.

<sup>49</sup> Tim Weiner, *U.S. Spied On Iraq Under U.N. Cover, Officials Now Say*, N.Y. TIMES, Jan. 7, 1999, at A1.

1998 tapped internal Iraqi military and intelligence communications, which were screened by the United States for information useful to UNSCOM.<sup>50</sup> The United States and UNSCOM<sup>51</sup> defended this cooperation as appropriate, but the revelations led to proposals by France, Russia, and other states for substantially modifying, replacing, or eliminating the organization.<sup>52</sup>

On January 30, 1999, the Security Council, meeting in a special session, decided to set up three panels to review all aspects of Iraq's relations with the United Nations. Those panels were directed to assess and recommend future action on disarmament, the condition of Iraqis living under UN sanctions, and the status of Kuwaitis and others who had been missing since the 1990 Iraqi invasion of Kuwait.<sup>53</sup> The panels completed their reports by April 1999, calling for the continuation of some intrusive weapons inspections but with principal emphasis on monitoring by cameras, sensors and aerial reconnaissance. The reports also called for retaining the economic sanctions, although with fewer restrictions on Iraq's ability to obtain funds for humanitarian relief.<sup>54</sup>

In the fall of 1998, the U.S. Congress authorized and appropriated funds for military, communications, and humanitarian assistance to Iraqi opposition groups as designated by the President on the basis of their commitment to democratic principles, their inclusion of a "broad spectrum of Iraqi individuals," and their desire to maintain Iraq's territorial integrity.<sup>55</sup> In January 1999, the Clinton administration announced that it would disburse \$97 million to seven Iraqi opposition groups, including the Iraqi National Congress.<sup>56</sup>

#### THE INDIVIDUAL IN INTERNATIONAL LAW

##### *U.S. Government Internal Coordination of Human Rights Matters*

On December 10, 1998, President Clinton signed an executive order intended to promote better coordination among U.S. executive agencies on human rights matters. The executive order states that it shall be the policy and practice of the U.S. Government "fully to respect and implement its obligations under international human rights treaties to which it is a party" and "to promote respect for international human rights, both in our relationships with all other countries and by working with and strengthening the various international mechanisms for the promotion of human rights, including, among others, those of the United Nations, the International Labor Organization, and the

<sup>50</sup> Tim Weiner, *U.S. Used U.N. Team to Place Spy Device in Iraq, Aides Say*, N.Y. TIMES, Jan. 8, 1999, at A1. For claims that U.S. intelligence collection was associated with UNSCOM from early in UNSCOM's existence, see Barton Gellman, *U.S. Spied on Iraqi Military Via U.N.*, WASH. POST, Mar. 2, 1999, at A1; Philip Shenon, *C.I.A. Was With U.N. in Iraq For Years, Ex-Inspector Says*, N.Y. TIMES, Feb. 23, 1999, at A1.

<sup>51</sup> John M. Goshko, *U.N. Inspector Again Denies Spying Charge*, WASH. POST, Jan. 9, 1999, at A14.

<sup>52</sup> See, e.g., John M. Goshko, *Russia Presents Plan to End Iraqi Oil Embargo, Replace UNSCOM*, WASH. POST, Jan. 16, 1999, at A9.

<sup>53</sup> Note by the President of the Security Council, UN Doc. S/1999/100; Reuters, *U.N. to Review Policy on Iraq*, WASH. POST, Jan. 31, 1999, at A26. Iraq protested the Security Council's decision. Reuters, *Iraq Blasts U.N. Decision to Review Their Relations*, WASH. POST, Feb. 1, 1999, at A15.

<sup>54</sup> Letters Dated 27 and 30 March 1999, Respectively, from the Chairman of the Panels Established Pursuant to the Note by the President of the Security Council of 30 January 1999 (S/1999/100) Addressed to the President of the Security Council, UN Doc. S/1999/356; see John M. Goshko, *U.N. Makes Little Headway on Iraq Issues*, WASH. POST, Apr. 8, 1999, at A14. Iraq rejected the panels' recommendations. Judith Miller, *Iraq Rejects Panels' Efforts to end Impasse on Security Council*, N.Y. TIMES, Apr. 9, 1999, at A3.

<sup>55</sup> Iraq Liberation Act of 1998, Pub. L. No. 105-338, §5(c), 112 Stat. 3178, 3180 (1998); sec. 590 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

<sup>56</sup> Vernon Loeb, *Anti-Saddam Groups Named for U.S. Aid*, WASH. POST, Jan. 16, 1999, at A8.

Organization of American States."<sup>1</sup> The executive order establishes an interagency working group on human rights treaties, chaired by the White House, which, inter alia, is charged with coordinating the review of any significant interagency human rights issues, making recommendations in connection with pursuing the ratification of human rights treaties, coordinating the preparation of reports to be submitted by the United States in fulfillment of its treaty obligations, coordinating U.S. responses to human rights complaints against it before international organizations, developing mechanisms for ensuring that legislation proposed by the executive branch is in conformity with U.S. human rights obligations, and making recommendations for improving the monitoring of actions at all levels in the United States for their conformity with human rights obligations.

### *Prohibition on Use of Funds for Foreign Security Forces Committing Human Rights Abuses*

Congress enacted a provision in the foreign assistance legislation for fiscal year 1998 prohibiting foreign assistance funds, including U.S. loan guarantees, from being used to aid units of foreign security forces that are committing human rights violations.<sup>1</sup> While the United States has no financial relationship with many states that have poor human rights records, the new provision (if repeated in future foreign assistance legislation) is expected to prompt extensive debate within the executive branch over U.S. support for other such states with which the United States seeks better relations, such as Algeria, China, Colombia, Indonesia, Mexico, and Rwanda. In December 1998, a request from a U.S. defense company for U.S. government financing for Turkey to purchase armored vehicles was denied under the new legislation, since the vehicles would be used by police in areas where state-sponsored torture occurs.<sup>2</sup>

### *Sanctions against States Tolerating Religious Persecution*

On October 27, 1998, President Clinton signed into law the International Religious Freedom Act of 1998,<sup>1</sup> which, among other things, calls for various executive actions and economic sanctions against any foreign state identified as engaging in or tolerating religious persecution. When initially introduced by Senator Don Nickles in 1997, the proposed law was strongly endorsed by the Christian Coalition and other conservative religious groups in the United States but was viewed with skepticism by the Clinton administration.<sup>2</sup>

On May 12, 1998, John Shattuck, Assistant Secretary for Democracy, Human Rights and Labor, outlined the administration's concerns in a statement before the Senate Committee on Foreign Relations.<sup>3</sup> Insisting that the Clinton administration "is committed to confronting violations of religious freedom, including religious intolerance and discrimination, no matter where they may occur around the world," Shattuck expressed concern about the bill's sanctions and reporting mechanisms; its definition of religious persecution; its waiver provisions; its mandating of new reports without providing for additional resources; and its creation of new institutions. With respect to the imposition of sanctions, Shattuck stated:

Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998), 38 ILM 493 (1999).

Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. No. 105-118, §570, 111 Stat. 2386, 2429 (1997).

<sup>1</sup> Dana Priest, *New Human Rights Law Triggers Policy Debate*, WASH. POST, Dec. 31, 1998, at A34.

Pub. L. No. 105-292, 112 Stat. 2787 (1998).

<sup>2</sup> See Eric Schmitt, *Bill to Punish Nations Limiting Religious Beliefs Passes Senate*, N.Y. TIMES, Oct. 10, 1998, at A3.

<sup>3</sup> S. 1868: *The International Religious Freedom Act of 1998: Hearings Before the Senate Comm. on Foreign Relations*, 105th Cong. 87 (May 12 & June 17, 1998) (statement of John Shattuck, Assistant Secretary of State for Democracy, Human Rights, and Labor).

Our first major concern is the bill's requirement that the President impose one (or more) of sixteen executive actions and economic sanctions on any country identified as engaging in or tolerating religious persecution. We are concerned that the bill's sanctions-oriented approach fails to recognize the value of incentives and dialogue in promoting religious freedom and encouraging further improvements in some countries. As I discussed above, many of our more notable works on behalf of religious freedom have come thanks to the pro-active approach of our diplomats in Laos, Turkey, Austria, and elsewhere.

We also believe that the sanctions provisions will be counterproductive. In particular, while the imposition of sanctions is likely to have little direct impact on most governments engaged in abuses, it runs the risk of strengthening the hand of those governments and extremists who seek to incite religious intolerance. We fear that the sanctions could result in greater pressures—and even reprisals—against minority religious communities. This is a message we are receiving from both missionary groups and overseas religious figures, who point out that minority religious communities risk being accused of complicity in this American effort.

We also believe that sanctions could have an adverse impact on our diplomacy in places like the Middle East and South Asia, undercutting Administration efforts to promote the very regional peace and reconciliation that can foster religious tolerance and respect for human rights.

We do understand that the legislation contains waiver provisions. However, those provisions would not eliminate the annual, automatic condemnations required by the legislation, which are our principal source of concern. To be sure, public condemnation—and even sanctions—may be appropriate in many instances, but not in all cases. As I have suggested, if the United States does not have the flexibility to determine when and how to condemn violators, we could endanger the well-being of those we are trying to help. This would limit U.S. efforts to work collectively with other nations to promote religious freedom, reconciliation, and peace, not to mention other critical national security objectives.<sup>4</sup>

In September 1998, Senator Nickles proposed modifications to the bill to address some of the administration's concerns, and the new version was passed by both Houses of Congress.<sup>5</sup> On October 27, 1998, President Clinton signed the bill into law. With respect to the imposition of sanctions, the President stated:

Section 401 of this Act calls for the President to take diplomatic and other appropriate action with respect to any country that engages in or tolerates violations of religious freedom. This is consistent with my Administration's policy of protecting and promoting religious freedom vigorously throughout the world. We frequently raise religious freedom issues with other governments at the highest levels. I understand that such actions taken as a matter of policy are among the types of actions envisioned by section 401.

I commend the Congress for incorporating flexibility in the several provisions concerning the imposition of economic measures. Although I am concerned that such measures could result in even greater pressures—and possibly reprisals—against minority religious communities that the bill is intended to help, I note that section 402 mandates these measures only in the most extreme and egregious cases of religious persecution. The imposition of economic measures or commensurate actions is required only when a country has engaged in systematic, ongoing, egregious violations of religious freedom accompanied by flagrant denials of the right to life, liberty, or the security of persons—such as torture, enforced and arbitrary

<sup>4</sup> *Id.* at 92.

<sup>5</sup> See Schmitt, *supra* note 2.



disappearances, or arbitrary prolonged detention. I also note that section 405 allows me to choose from a range of measures, including some actions of limited duration.

The Act provides additional flexibility by allowing the President to waive the imposition of economic measures if violations cease, if a waiver would further the purpose of the Act, or if required by important national interests. Section 402(c) allows me to take into account other substantial measures that we have taken against a country, and which are still in effect, in determining whether additional measures should be imposed. I note, however, that a technical correction to section 402(c)(4) should be made to clarify the conditions applicable to this determination. My Administration has provided this technical correction to the Congress.

I regret, however, that certain other provisions of the Act lack this flexibility and infringe on the authority vested by the Constitution solely with the President. For example, section 403(b) directs the President to undertake negotiations with foreign governments for specified foreign policy purposes. It also requires certain communications between the President and the Congress concerning these negotiations. I shall treat the language of this provision as precatory and construe the provision in light of my constitutional responsibilities to conduct foreign affairs, including, where appropriate, the protection of diplomatic communications.<sup>6</sup>

### *Tracking Aliens in the United States*

When the Illegal Immigration Reform and Immigrant Responsibility Act was passed on September 30, 1996, one provision (section 110) required that within two years the Attorney General develop an "automated entry and exit control system" capable of (1) recording the departure of every alien from the United States and matching the record of departure with the record of the alien's arrival in the United States; and (2) enabling the Attorney General to identify, through on-line searching procedures, lawfully admitted nonimmigrants who remain in the United States beyond the period authorized by the Attorney General.<sup>1</sup>

On November 5, 1997, Senator Spencer Abraham, Chairman of the Senate Subcommittee on Immigration, outlined various criticisms of this provision:

I recently chaired a field hearing of the Immigration Subcommittee in Detroit, Michigan, at which elected officials and industry representatives testified on the traffic congestion, lost business and employment opportunities, and harm to America's international relations that could result from the full implementation of section 110.

. . . .

Traffic congestion is an all too common occurrence in this country, and at many of our busy border crossings it occurs as part of the daily routine. In Detroit, five to ten minute delays are the common result of current INS customs inspections. But imagine, if you will, the nightmare of a border-check system which could cause miles of back-up at facilities wholly unequipped to handle them.

Under section 110, every foreign citizen could be required to present a yet undetermined form of identification to INS inspectors, whereupon these inspectors must properly record identity information for use in a "master database." In 1996 alone, over 116 million people entered the United States by land from Canada. Similarly, over 52 million Canadian residents and United States permanent residents

<sup>6</sup> Statement by the President on Religious Freedom Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2149 (Oct. 27, 1998).

<sup>1</sup> Illegal Immigration Reform and Immigrant Responsibility Act, §110, 8 U.S.C.A. §1221 note (West Supp. 1998). Once the system was established, the law required an annual report to Congress containing information on the arrival and departure of aliens.

entered Canada last year. Section 110 would require a stop on the U.S. side to record the exit of each person in every car. That is more than 140,000 each day; 6,000 each hour; 100 each and every minute. And that is only in one direction.

And these are only the immediate, direct effects of section 110. Manufacturers across the nation will feel the detrimental effect of late shipments of goods. Just-in-time inventory systems will cease to exist. Trans-border trade will be hampered not by intent, but by incident. Of course, it is entirely possible for us to somewhat mitigate these troubles through investment in infrastructure. But the increased investment would likely be measured by tens of billions of dollars. . . .

To the best of my knowledge, the cost of the technology required to undertake this automated data collection and analysis is unknown, as such technology does not yet exist. Even so, it is difficult to believe that the gains achieved by implementation of section 110 could approach, let alone outweigh, its costs.<sup>2</sup>

Senator Abraham then briefly described legislation he was introducing that "would exclude the land border from automated entry-exit control and otherwise maintain current practices regarding lawful permanent residents and a handful of our neighboring territories, including Canada, whose nationals do not pose a particular immigration threat."<sup>3</sup> Instead of passing Senator Abraham's bill, however, Congress extended the deadline for implementation of the INS system with respect to land border and sea ports of entry to March 30, 2001.<sup>4</sup>

#### *Tampere Convention on Telecommunications Assistance*

Under the auspices of the Government of Finland, the International Telecommunication Union, and the UN Office for the Coordination of Humanitarian Affairs, the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations was negotiated in Finland during June 1998.<sup>1</sup> The purpose of the Tampere Convention is to provide a framework, under the UN Emergency Relief Coordinator, that minimizes barriers to the movement of telecommunications assistance across national boundaries during emergencies. Designed for use primarily during natural disasters and complex humanitarian emergencies, the Convention seeks to prevent host governments or nongovernmental organizations from misdirecting telecommunications assistance to other than relief operations and to protect the individuals providing that assistance and their equipment. The Convention could also be used during peacekeeping operations or in response to a terrorist-caused disaster.

A unique feature of the Convention is the provision of privileges and immunities by the host government (to the extent allowed by national law) to the visiting telecommunications workers. Such privileges and immunities include immunity from criminal and civil liability for harm caused by employment-related acts.

The United States signed the Convention on November 17, 1998.<sup>2</sup>

<sup>2</sup> *Impact of Entry-Exit System on U.S. Border: Hearings on S. 1360 Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 4, 5 (1997) (statement of Senator Spencer Abraham), available in 1997 WL 14152948.

<sup>3</sup> S. 1360, 105th Cong. (1997), available in LEXIS, Legis Library, BL Text File.

<sup>4</sup> Section 116 of the Department of Justice Appropriations Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

<sup>1</sup> Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, opened for signature June 18, 1998 (<http://www.itu.int/newsarchive/projects/ICET/tampereconvention.html>).

<sup>2</sup> See (<http://www.state.gov/www/issues/relief/tperel.html>).

## LAW OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS

*Functions of the Depositary*

By a note dated September 25, 1998, the UN Secretary-General informed all states that are entitled to become parties to the Rome Statute of the International Criminal Court of certain proposed corrections to the original text of the statute. The Secretary-General serves as the depositary of the statute, which was adopted at a UN diplomatic conference on July 17, 1998. Although it participated in negotiating the statute and is entitled to become a party, the United States has declined to sign it.<sup>1</sup>

In a note to the Secretary-General from the U.S. Mission to the United Nations, the United States noted the following concerns and objections regarding the UN procedures for correcting the six authentic texts and the certified true copies:

First, the United States wishes to draw attention to the fact that, in addition to the corrections which the Secretary-General now proposes, other changes had already been made to the text which was actually adopted by the Conference, without any notice or procedure. The text before the Conference was contained in A/CONF.183/C.1/L.76 and Add. 1-13. The text which was issued as a final document, A/CONF.183/9, is not the same text. Apparently, it was this latter text which was presented for signature on July 18, even though it differed in a number of respects from the text that was adopted only hours before. At least three of these changes are arguably substantive, including the changes made to Article 12, paragraph 2(b), the change made to Article 93, paragraph 5, and the change made to Article 124. Of these three changes, the Secretary-General now proposes to "re-correct" only Article 124, so that it returns to the original text, but the other changes remain. The United States remains concerned, therefore, that the corrections process should have been based on the text that was actually adopted by the Conference.

Second, the United States notes that the Secretary-General's communication suggests that it is "established depositary practice" that only signatory States or contracting States may object to a proposed correction. The United States does not seek to object to any of the proposed corrections, or to the additional corrections that were made earlier and without formal notice, although this should not be taken as an endorsement of the merits of any of the corrections proposed. The United States does note, however, that insofar as arguably substantive changes have been made to the original text without any notice or procedure, as noted above in relation to Articles 12 and 93, if any question of interpretation should subsequently arise it should be resolved consistent with A/CONF.183/C.1/L.76, the text that was actually adopted.

More fundamentally, however, as a matter of general principle and for future reference, the United States objects to any correction procedure, immediately following a diplomatic conference, whereby the views of the vast majority of the Conference participants on the text which they have only just adopted would not be taken into account. The United States does not agree that the course followed by the Secretary-General in July represents "established depositary practice" for the type of circumstances presented here. To the extent that such a procedure has previously been established, it must necessarily rest on the assumption that the Conference itself had an adequate opportunity, in the first instance, to ensure the adoption of a technically correct text. Under the circumstances which have prevailed in some recent conferences, and which will likely recur, in which critical portions of the text

<sup>1</sup> For the United States' refusal to sign the Rome statute, see 93 AJIL 186 (1999).

are resolved at very late stages and there is no opportunity for the usual technical review by the Drafting Committee, the kind of corrections process which is contemplated here must be open to all.<sup>2</sup>

#### STATE JURISDICTION AND JURISDICTIONAL IMMUNITIES

##### *Waiver of Georgian Diplomat's Immunity from Criminal Prosecution*

On January 3, 1997, a diplomat posted at the Embassy of Georgia in Washington, D.C., Gueorgui Makharadze, was speeding in his car when it crashed, causing a multicar collision that killed sixteen-year-old Joviane Waltrick and injured four other persons. At the time of her death, Waltrick was a citizen of Brazil on a tourist visa in the United States.

The U.S. Attorney's office for the District of Columbia informed the Department of State that its initial review of the evidence indicated that Makharadze could be charged with negligent homicide, involuntary manslaughter, or second-degree murder. Consequently, on January 9, the Department of State requested that the Georgian Embassy waive Makharadze's immunity from criminal prosecution.<sup>1</sup> On January 10, President Eduard A. Shevardnadze of the Republic of Georgia announced that Georgia was prepared to waive the diplomat's immunity.

After further discussions between the two governments regarding the charges that would be brought against Makharadze, the Department of State, on February 11, 1997, transmitted to the Embassy of Georgia an affidavit setting forth the U.S. Attorney's evidence in the case and providing information on the maximum sentence that could be imposed if Makharadze were charged and convicted of involuntary manslaughter and aggravated assault.<sup>2</sup> By diplomatic note dated February 14, the Embassy responded as follows:

The Government of Georgia has considered the request of the United States Department of State and according to Article 32 of the Vienna Convention on Diplomatic Relations has waived the diplomatic immunity for Mr. George Makharadze, so he can be prosecuted in the United States, for the accident that took place on January 3, 1997, in Washington, DC.<sup>3</sup>

After welcoming this decision, State Department spokesman Nicholas Burns noted that it was "highly unusual in modern diplomacy for a head of state to take a step like this. But given the emotions in the United States, given the feelings of the family and the local community here in Washington, D.C., we think it's the appropriate step for the Government of Georgia to take."<sup>4</sup>

On February 20, 1997, Makharadze was charged with one count of involuntary manslaughter and four counts of aggravated assault for the death of Waltrick and injuries to four others.<sup>5</sup> In October, Makharadze pleaded guilty. As part of a plea bargain, prosecutors agreed not to object to the diplomat's request to serve his sentence in a federal

<sup>2</sup> Note L98-1105 (ICC#L4667) from the Chargé d'Affaires ad interim of the United States of America to the Secretary-General (Nov. 5, 1998) (on file at GWU).

<sup>1</sup> Ruben Castaneda, *Georgia to Send Home Diplomat Involved in Car Crash*, WASH. POST, Jan. 10, 1997, at A17.

<sup>2</sup> U.S. Dep't of State, Diplomatic Note to the Embassy of the Republic of Georgia (Feb. 11, 1997) (on file at GWU).

<sup>3</sup> Embassy of the Republic of Georgia, Diplomatic Note to the U.S. Department of State (Feb. 14, 1997) (on file at GWU); see also Scott Bowles, *Diplomat's Immunity is Waived; Georgian Can Face Charges in Fatal Crash*, WASH. POST, Feb. 16, 1997, at A1.

<sup>4</sup> Nicholas Burns, U.S. Dep't of State Daily Press Briefing at 3, 7 (Jan. 10, 1997) (<http://secretary.state.gov/www/briefings/9701/970110.html>).

<sup>5</sup> *United States v. Makharadze*, No. F-1446-97 (D.C. Super. Ct. filed Feb. 20, 1997); see also Bill Miller, *Diplomat Surrenders in Deadly D.C. Crash*, WASH. POST, Feb. 21, 1997, at A1.

prison instead of in the District's Lorton Correctional Complex. He was sentenced to seven to twenty-one years in prison on December 19.<sup>6</sup>

On December 31, 1997, the estate of Joviane Waltrick filed a civil suit in federal court against various parties: Makharadze, the Republic of Georgia (for letting Makharadze drive despite a history of traffic violations), Yanni's Greek Tavern (where Makharadze drank wine immediately prior to the accident), the Ford Motor Co. and Jerry's Ford Sales (based on Makharadze's claims that the brakes had failed), and certain insurance and credit companies.<sup>7</sup> In order to establish the responsibility of the Republic of Georgia, the complaint alleged that Makharadze had been acting within the scope of his employment since the accident occurred after he had consumed alcohol at an official dinner function and while he was using a vehicle leased by the Embassy.<sup>8</sup>

On January 9, 1998, plaintiff's counsel in the case requested that the Department of State seek a waiver from the Republic of Georgia of Makharadze's immunity from civil suit. The Department of State responded, in part:

Mr. Makharadze was a diplomatic agent accredited to the Embassy of Georgia. However, when he was incarcerated after having entered guilty pleas to criminal charges arising from the accident in which Miss Waltrick was killed, he ceased to perform diplomatic functions. Therefore, pursuant to Article 39(2) of the Vienna Convention on Diplomatic Relations, Mr. Makharadze has residual immunity from civil jurisdiction of U.S. courts only "with respect to acts performed . . . in the exercise of his functions as a member of the mission."

It is not the Department's practice to seek the waiver of immunity in civil cases in instances where the defendant's immunity is limited to acts done within the scope of his diplomatic functions. We note that Mr. Makharadze would be amenable to suit if the court were to determine that his actions were nondiplomatic in nature. If the court finds otherwise, your clients would continue to have recourse against the insurance company and other named defendants.<sup>9</sup>

On April 22, 1998, counsel for Makharadze sought his dismissal from the civil case on grounds of diplomatic immunity. On May 29, U.S. District Judge Thomas F. Hogan granted the motion, concluding:

Plaintiff has not established a waiver of defendant Makharadze' immunity from civil jurisdiction. Neither the Republic of Georgia's explicit waiver of criminal immunity nor the circumstances surrounding that waiver support such a conclusion. Furthermore, although defendant Makharadze no longer enjoys the blanket immunity granted to acting diplomatic officers, he enjoys residual immunity for actions taken in performance of his former duties. Because plaintiff explicitly pleads that the accident occurred in the course of defendant Makharadze' official duties, the Court must conclude that residual immunity attaches. Therefore, because defendant Makharadze enjoys immunity from the civil jurisdiction of this Court, the Court must dismiss him from the case.<sup>10</sup>

<sup>6</sup> Bill Miller, *Diplomat Sentenced in Teen's Death; Georgian Gets 7 to 21 Years for Drunk-Driving Crash in D.C.*, WASH. POST, Dec. 20, 1997, at A1.

<sup>7</sup> Amended Complaint, *Knab v. Republic of Georgia*, No. 97-CV-03118 (TFH) (D.D.C. filed Dec. 31, 1997) [hereinafter Complaint]; see also Bill Miller, *Crash Victim's Mother Seeks Damages From Georgian Diplomat, Others*, WASH. POST, Jan. 1, 1998, at D4. The suit sought \$15 million in compensatory damages, plus unspecified punitive damages and costs.

<sup>8</sup> Complaint, *supra* note 7, paras. 9, 59-60.

<sup>9</sup> Letter of Linda Jacobson, Assistant Legal Adviser for Diplomatic Law and Litigation, U.S. Dep't of State, to Marjorie S. Zaid (Feb. 6, 1998) (on file at GWU).

<sup>10</sup> *Knab v. Republic of Georgia*, No. 97-CV-03118 (TFH), 1998 U.S. Dist. LEXIS 8820 (D.D.C. May 29, 1998) (mem.).

On October 14, 1998, all remaining defendants except Yanni's Greek Tavern agreed to settle the lawsuit for an undisclosed amount in excess of \$250,000.<sup>11</sup>

*Expulsion of Cuban Diplomats Working at the United Nations*

On December 23, 1998, the U.S. Department of State ordered three Cuban diplomats serving at the United Nations to leave the United States for "activities incompatible with their diplomatic status." The three diplomats reportedly were suspected of involvement in a scheme to infiltrate U.S. military bases and Cuban exile organizations in the United States.<sup>1</sup>

INTERNATIONAL CRIMINAL LAW

*U.S. Reward Program for Former Yugoslavia War Criminals*

A new State Department program was created by Congress in October 1998 whereby rewards of up to \$5 million could be offered for information that leads to the arrest or conviction of persons indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>1</sup> The program is similar to an existing reward program administered by the State Department directed against terrorists and international drug traffickers.<sup>2</sup>

*Arrest by U.S. Forces of Bosnian Serb Indictée*

On December 2, 1998, U.S. forces, operating as part of NATO forces in Bosnia, detained a Bosnian Serb general who had been secretly indicted in October by the International Criminal Tribunal for the former Yugoslavia. Major General Radislav Krstić was detained while traveling along a road in the U.S. sector in northeast Bosnia and then formally arrested by ICTY authorities, whereupon he was flown on a NATO aircraft to the Netherlands and placed in the jail in The Hague.

General Krstić is charged with genocide, crimes against humanity, and violation of the laws or customs of war for directing the 1995 attack on Srebrenica, during which some seven thousand Bosnian Muslim men who were taken into Bosnian Serb custody subsequently disappeared, amid evidence of widespread execution. The indictment charges command responsibility for such crimes, as well as direct personal involvement.<sup>1</sup>

*Extradition of Chilean Former President Pinochet*

On October 16, 1998, General Augusto Pinochet, the former President of Chile, was arrested in London by UK authorities after a Spanish magistrate, Judge Baltasar Garzón,

<sup>11</sup> Bill Miller, *Family Settles Suit Over Fatal Crash Caused by Drunken Diplomat*, WASH. POST, Oct. 15, 1998, at A5.

<sup>1</sup> Tim Weiner, *Washington Expels 3 Cuban Diplomats at U.N., Accusing Them of Spying*, N.Y. TIMES, Dec. 24, 1998, at A10.

<sup>1</sup> Walter Pincus, *Bounties Offered for Bosnian War Crimes Suspects*, WASH. POST, Dec. 5, 1998, at A19. The program applies to all ICTY indictees (for a current list of those indictees, see <http://www.un.org/icty/bl.html>). The program does not apply as yet to indictees of the International Criminal Tribunal for Rwanda or to other alleged war criminals, such as high-ranking members of the Khmer Rouge.

<sup>2</sup> Such rewards are provided under §36 of the State Department Basic Authorities Act of 1956, 22 U.S.C. §2708, most recently amended by §2202 of the Foreign Affairs Reform and Restructuring Act of 1993, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998), and Pub. L. No. 105-323, 112 Stat. 3029 (1998) (providing rewards for information leading to the arrest or conviction of any individual for the commission of an act, or conspiracy to commit an act, of international terrorism, for narcotics-related offenses, or for serious violations of international humanitarian law relating to the former Yugoslavia).

<sup>1</sup> *Statement by the Prosecutor Regarding the Detention of Radislav Krstic*, ICTY Press Release No. JL/PIU/368-E (Dec. 2, 1998); Steven Erlanger, *Bosnian Serb General Is Arrested by Allied Force in Genocide Case*, N.Y. TIMES, Dec. 3, 1998, at A1.

issued an international warrant seeking his detention. Spain requested the detention based on unspecified acts by General Pinochet from 1973 through 1992 of killing, injuring, and inflicting pain on persons. Initially, the only comment from the U.S. Department of State was that the matter was a legal issue between Spain and the United Kingdom.<sup>1</sup>

On October 28, the Divisional Court of the Queen's Bench Division ruled that General Pinochet was immune from arrest because he was a head of state at the time the alleged crimes were committed (General Pinochet was in power from 1973 to 1990).<sup>2</sup> On November 25, however, a five-judge panel of the House of Lords, by a 3-2 vote, ruled that General Pinochet was not immune on such grounds, given the nature of the crimes he had allegedly committed.<sup>3</sup> During the course of the appeal, the Government of Spain had submitted a formal extradition request in which it alleged that General Pinochet directed a widespread conspiracy from 1973 to 1990 to take over the Government of Chile by coup and thereafter to reduce the country to submission through genocide, murder, torture, and the taking of hostages, primarily in Chile but elsewhere as well.

Thereafter, the UK Home Secretary certified that most of the crimes set forth in the Spanish request were extraditable crimes under the UK Extradition Act of 1989 (not, however, the charges of genocide), paving the way for the extradition to proceed.<sup>4</sup> On December 17, however, a different five-judge panel of the House of Lords set aside that decision on the grounds that it was tainted by bias (one of the judges had failed to disclose his close association with the human rights organization Amnesty International).<sup>5</sup>

On March 24, 1999, a seven-judge panel of the House of Lords, by a vote of 6-1, found that acts of torture (as well as conspiracy to commit torture) are "extraditable offenses" under the UK Extradition Act of 1989, so long as they occurred after September 29, 1988, when the UK Criminal Justice Act entered into force establishing within the United Kingdom the crime of torture.<sup>6</sup> Although the seven different decisions by the judges vary in their treatment of the issues, in essence the House of Lords found that General Pinochet could not be extradited for conduct that was not criminal under UK law at the time it occurred. Further, the House of Lords found that General Pinochet could not invoke as "official acts" under the UK State Immunity Act of 1978 those acts regarded as criminal under international law (such as

<sup>1</sup> Alan Cowell, *Arrest Raises New Issues on Tracking Rights Crimes*, N.Y. TIMES, Oct. 19, 1998, at A8 (quoting the spokesman of the Department of State). The assertion of jurisdiction was subsequently confirmed by an 11-member panel of senior Spanish judges, based, inter alia, on the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 UNTS 85. Marlise Simons, *Judges in Spain Assert Pinochet Can Face Trial*, N.Y. TIMES, Oct. 31, 1998, at A1. Judge Garzón issued a formal indictment against General Pinochet on December 10, 1998, charging that he led a criminal organization to kill or cause the disappearance of some 3,000 opponents of his regime. Al Goodman, *Judge Describes Pinochet Case in Full Detail*, N.Y. TIMES, Dec. 11, 1998, at A15.

<sup>2</sup> 38 ILM 58 (1999); Warren Hoge, *English Court Rules Pinochet Should be Free*, N.Y. TIMES, Oct. 29, 1998, at A1; T. R. Reid, *Pinochet's Detention is Ruled Illegal*, WASH. POST, Oct. 29, 1998, at A1.

<sup>3</sup> 38 ILM 1302 (1999); Warren Hoge, *British Court Rules Against Pinochet; Now Cabinet Must Weigh Extradition*, N.Y. TIMES, Nov. 26, 1998, at A1; T. R. Reid, *Britain Denies Pinochet Immunity*, WASH. POST, Nov. 26, 1998, at A1.

<sup>4</sup> 38 ILM 489 (1999); Warren Hoge, *Briton Won't Free Pinochet, Ruling the Case Can Proceed*, N.Y. TIMES, Dec. 10, 1998, at A3; T. R. Reid, *Britain Says Extradition of Pinochet Can Proceed*, WASH. POST, Dec. 10, 1998, at A1.

<sup>5</sup> 38 ILM 430 (1999); Warren Hoge, *Pinochet Wins a Round as the Law Lords Void a Ruling*, N.Y. TIMES, Dec. 18, 1998, at A3.

<sup>6</sup> 38 ILM 430 (1999); Warren Hoge, *Pinochet Arrest Upheld, but Most Charges Are Discarded*, N.Y. TIMES, Mar. 25, 1999, at A6; T. R. Reid, *Pinochet's Arrest Upheld; Most Charges Thrown Out*, WASH. POST, Mar. 25, 1999, at A1. The UK Criminal Justice Act of 1988 incorporated into UK law obligations imposed by the 1984 Convention against Torture, *supra* note 1, which the United Kingdom joined in 1988.

torture), although he was entitled to immunity for acts regarded as criminal only under national law. This decision significantly reduced the scope of the charges for which General Pinochet could be extradited, and Judge Garzón subsequently amended his extradition request so as to focus on acts of torture committed from 1988 to 1990.<sup>7</sup>

U.S. human rights advocates urged the Clinton administration to declassify and make available to Judge Garzón records on General Pinochet's regime in Chile.<sup>8</sup> The United States had such information in part owing to its close monitoring of General Pinochet during his time in power and in part owing to a 1976 bombing in Washington, D.C., that killed Orlando Letelier, a leading opponent of Pinochet, and Ronni Moffitt, a twenty-five-year-old American. Spanish court authorities announced that Judge Garzón had a strong interest in obtaining that information,<sup>9</sup> saying he would pursue the matter on the basis of the U.S.-Spain Mutual Legal Assistance Treaty.<sup>10</sup> On December 1, U.S. officials announced that the U.S. Government would declassify and release documents on killings and torture during General Pinochet's regime. James P. Rubin, the Department of State spokesman, stated that while the United States did not have an opinion on the merits of the Spanish magistrate's case, "[w]e will declassify and make public as much information as possible consistent with US laws and the national security and law enforcement interests of the United States."<sup>11</sup>

### *Combating Bribery of Foreign Public Officials*

On November 21, 1997, member countries of the Organisation for Economic Co-operation and Development (OECD) and five nonmember countries (Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic) adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>1</sup> Article 1 of that Convention states, in pertinent part:

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

The Convention provides that bribery of foreign public officials shall be punishable by "effective, proportionate, and dissuasive criminal penalties." Parties are required to make such bribes and the proceeds thereof subject to seizure and confiscation, or to apply

<sup>7</sup> Warren Hoge, *Pinochet Faces 33 New Counts in Extradition*, N.Y. TIMES, Mar. 28, 1999, at 6.

<sup>8</sup> William Branigin, *U.S. Urged to Pursue Pinochet on Bombing*, WASH. POST, Nov. 26, 1998, at A61; see also William Branigin, *Absent Without Leave on the Pinochet Case*, WASH. POST, Dec. 8, 1998, at A23.

<sup>9</sup> Marlise Simons, *Spanish Judge is Hoping to See Secret Files in U.S.*, N.Y. TIMES, Nov. 27, 1998, at A14.

<sup>10</sup> Treaty on Mutual Legal Assistance in Criminal Matters between the United States of America and the Kingdom of Spain, Nov. 20, 1990, U.S.-Spain, S. TREATY DOC. NO. 102-21 (1992).

<sup>11</sup> James P. Rubin, U.S. Dep't of State Press Briefing at 14 (Dec. 1, 1998) (<http://secretary.state.gov/www/briefings/9812/981201db.html>); Tim Weiner, *U.S. Will Release Files on Crimes Under Pinochet*, N.Y. TIMES, Dec. 2, 1998, at A1.

<sup>1</sup> 37 ILM 1 (1998).



comparable monetary fines. The Convention further provides for mutual legal assistance and extradition with respect to covered offenses. Implementation of the Convention will be monitored through a peer review mechanism coordinated by the OECD Working Group on Bribery in International Business Transactions.

On May 1, 1998, President Clinton transmitted the Convention to the Senate for advice and consent, stating:

Since the enactment in 1977 of the Foreign Corrupt Practices Act (FCPA), the United States has been alone in specifically criminalizing the business-related bribery of foreign public officials. United States corporations have contended that this has put them at a significant disadvantage in competing for international contracts with respect to foreign competitors who are not subject to such laws. Consistent with the sense of the Congress, as expressed in the Omnibus Trade and Competitiveness Act of 1988, encouraging negotiation of an agreement within the OECD governing the type of behavior that is prohibited under the FCPA, the United States has worked assiduously within the OECD to persuade other countries to adopt similar legislation. Those efforts have resulted in this Convention that, once in force, will require that the Parties enact laws to criminalize the bribery of foreign public officials to obtain or retain business or other improper advantage in the conduct of international business.

While the Convention is largely consistent with existing U.S. law, my Administration will propose certain amendments to the FCPA to bring it into conformity with and to implement the Convention. Legislation will be submitted separately to the Congress.<sup>2</sup>

The Senate Committee on Foreign Relations favorably recommended the treaty to the full Senate on July 16, 1998, which approved it unanimously on July 31, 1998.<sup>3</sup> Legislation necessary to implement the treaty, the International Anti-Bribery and Fair Competition Act of 1998, was approved by Congress on October 21, 1998,<sup>4</sup> and was signed into law by President Clinton on November 17, 1998.<sup>5</sup> The U.S. instrument of ratification of the treaty was deposited on December 8, 1998. When the treaty entered into force on February 15, 1999, ten other signatories had also deposited instruments of ratification.

The most significant changes to the FCPA made by the International Anti-Bribery and Fair Competition Act of 1998 are that it adds officials of public international organizations to the definition of "foreign official" and expands U.S. jurisdiction both to acts committed by U.S. nationals wholly outside the United States, without the requirement of a nexus to U.S. interstate commerce, and to acts committed by foreign persons while in the territory of the United States.

<sup>2</sup> Letter to Congress on Bribery of Foreign Public Officials, May 5, 1998, Daily Presidential Statements, available in 1998 WL 216072 (White House).

<sup>3</sup> Senate Passes Proxmire-Inspired Treaty, FDCH GOVT. PRESS RELEASE, July 31, 1998, available in 1998 WL 7326334.

<sup>4</sup> Congress Passes Bill to Curb International Business Bribery, N.Y. TIMES, Oct. 22, 1998, at A5. In the preceding two weeks, the Senate and House had continuously passed versions of the bill with amendments objectionable to the other side; in the end, the version passed did include a controversial section introduced by Congressmen Thomas Bliley and Mike Oxley, which states that international organizations providing commercial communications services shall not be accorded legal immunity for action taken in connection with their capacity as a provider of telecommunications services to, from, or within the United States. For discussion of this section in the Senate, see 144 CONG. REC. S12973 (daily ed. Oct. 21, 1998).

<sup>5</sup> International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998); see Memorandum by the President on Delegation of Authority Under the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2323 (Nov. 16, 1998).

## INTERNATIONAL ECONOMIC LAW

*Proposed "Millennium" Round of Multilateral Trade Negotiations*

In his 1999 State of the Union Address to Congress, President Clinton stated his views on steps to be taken to manage international trade, including the launching of a new round of multilateral trade negotiations:

First, we ought to tear down barriers, open markets, and expand trade. But at the same time, we must ensure that ordinary citizens in all countries actually benefit from trade—a trade that promotes the dignity of work, and the rights of workers, and protects the environment. We must insist that international trade organizations be more open to public scrutiny, instead of mysterious, secret things subject to wild criticism.

When you come right down to it, now that the world economy is becoming more and more integrated, we have to do in the world what we spent the better part of this century doing here at home. We have got to put a human face on the global economy.

We must enforce our trade laws when imports unlawfully flood our nation. . . .

We must help all manufacturers hit hard by the present crisis with loan guarantees and other incentives to increase American exports by nearly \$2 billion. I'd like to believe we can achieve a new consensus on trade, based on these principles. And I ask the Congress again to join me in this common approach and to give the President the trade authority long used—and now overdue and necessary—to advance our prosperity in the 21st century.

Tonight, I issue a call to the nations of the world to join the United States in a new round of global trade negotiations to expand exports of services, manufactures and farm products. Tonight I say we will work with the International Labor Organization on a new initiative to raise labor standards around the world. And this year, we will lead the international community to conclude a treaty to ban abusive child labor everywhere in the world.<sup>1</sup>

The next day, U.S. Trade Representative Charlene Barshefsky stated that the United States would seek a three-year round of multilateral trade negotiations directed at dismantling agricultural trade barriers, ensuring that biotechnology and genetically engineered food products are not discriminated against, and agreeing on services liberalization in areas such as telecommunications, distribution, construction, professions, and express delivery. Further, the United States would like the negotiations to focus on WTO institution building in areas such as technical assistance to less-developed countries; collaboration on customs, trade, and environment; better collaboration with the International Labour Organization; and cooperation among the International Monetary Fund, World Bank, and WTO to improve world financial systems.<sup>2</sup>

## ENVIRONMENTAL, SCIENCE, AND HEALTH AFFAIRS

*Kyoto Protocol to Climate Change Convention*

In December 1997, in Kyoto, Japan, industrialized nations for the first time accepted in principle that they should be bound to specific targets and timetables on greenhouse

<sup>1</sup> Address Before a Joint Session of the Congress on the State of the Union, 35 WEEKLY COMP. PRES. DOC. 78, 83–84 (Jan. 19, 1999).

<sup>2</sup> Mark Felsenthal & Chad Bowman, *Clinton Calls for New Global Trade Round Including Intellectual Property, Procurement*, 16 Int'l Trade Rep. (BNA) 72 (1999).

gas emissions as a means of addressing climate change.<sup>1</sup> Under the Kyoto Protocol<sup>2</sup> to the UN Framework Convention on Climate Change (UNFCCC),<sup>3</sup> those nations are bound to specific targets and timetables that, when taken together, should lead by 2012 to an overall reduction of emissions levels to 5 percent below 1990 levels.<sup>4</sup> The Kyoto Protocol was open for signature from March 1998 to March 1999 and will enter into force after fifty-five states ratify or adhere to it (so long as those states account for at least 55 percent of the total 1990 carbon dioxide emissions of developed countries).

The agreement left open a substantial number of issues about its operational framework. Furthermore, critics faulted the agreement for focusing on the emissions levels of industrialized countries, not those of developing countries such as China and India, which are increasingly responsible for greenhouse gas emissions. As of October 1998, only fifty-five countries had signed the agreement, not including the United States, the world's largest emitter of greenhouse gases.<sup>5</sup>

The Fourth Conference of the Parties to the UNFCCC in November 1998 in Buenos Aires considered the shape and pace of the work schedule for implementing the Kyoto Protocol. In particular, it focused on how to proceed in developing rules for three key market-based mechanisms adopted under the Protocol: emissions trading (whereby a country or private company achieves its reductions by buying them from a country or company that has reduced its emissions more than is required); clean development (whereby developed countries invest in emissions reduction projects in developing countries); and joint implementation (whereby developed countries invest in emissions projects in developed countries).

During the conference, on November 11, Argentina announced that it would assume binding targets and timetables for controlling emissions, the first developing country to do so. The next day, on November 12, the United States signed the Protocol. The U.S. Under Secretary of State for Economic, Business, and Agricultural Affairs, Stuart Eizenstat, made the following remarks:

Kyoto is a landmark achievement, but it is a work-in-progress and key issues remain outstanding. As an original signatory to the Protocol, the United States will be able to play a stronger, more effective role in resolving these issues.

The first major set of issues concerns the Protocol's flexibility mechanisms, including international emissions trading and the Clean Development Mechanism.

These mechanisms can be the engines that drive both the cost-effective achievement of our environmental objectives and the transfer of climate-friendly technology to the developing world. To realize that promise, we must develop appropriate means for measurement, reporting and compliance, and resolve liability considerations to create a system with integrity and high standards.

Our experience in the United States has proven the enormous potential of a well-designed system of emissions trading. In our fight against acid rain, emissions trading has allowed us to achieve our goals 30% faster at less than half the projected

<sup>1</sup> Greenhouse gases include carbon dioxide, methane, nitrous oxide, and gases from synthetic substitutes for ozone-depleting chlorofluorocarbons. Most emissions are caused by the burning of coal, oil, wood, and natural gas. By creating an atmospheric screen comparable to tinted glass in a greenhouse, these emissions are widely believed to create the conditions for global warming. According to the World Meteorological Organization, several of the ten warmest years on record have occurred since 1990 and the other three occurred after 1983. William K. Stevens, *Earth Temperature in 1998 Is Reported at Record High*, N.Y. TIMES, Dec. 18, 1998, at A26.

<sup>2</sup> Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, Dec. 10, 1997, 37 ILM 22 (1998).

<sup>3</sup> United Nations Framework Convention on Climate Change, May 9, 1992, 31 ILM 849 (1992).

<sup>4</sup> For a discussion of the Kyoto Protocol, see 92 AJIL 315 (1998). The United States reduction would be 7%.

<sup>5</sup> Jay Warrick, *As Glaciers Melt, Talks on Warming Face Chill*, WASH. POST, Nov. 2, 1998, at A1.

cost. Far from avoiding responsibility, trading is enabling us to fulfill our environmental responsibilities faster, and at less cost.

Done right on a global scale, emissions trading will allow the world to achieve greater greenhouse gas reductions at a faster pace and a lower cost for all Parties. At a time of global financial uncertainty, it should be clear to all that we cannot afford a system that makes the reduction of a ton of carbon more expensive than it needs to be. As Tuesday's roundtable made clear, a robust system of flexible mechanisms with clear rules—and without arbitrary limits—is the key to unlocking the energies and ingenuity of the private sector to meet the challenge of climate change.

The second key issue we must resolve is the meaningful participation of key developing countries in efforts to address climate change.

The United States commends Argentina for the historic announcement by President Menem yesterday that it will voluntarily take on a binding emissions target for the first commitment period of the Protocol. And we support Argentina's call for new pathways for developing countries to more actively participate in efforts to address climate change. . . .

. . . .

. . . . Without the meaningful participation of key developing nations, the world cannot meet the challenge of global warming no matter how much is done by industrialized countries.

That is why, absent such meaningful participation, President Clinton will not submit the Protocol to the United States Senate, whose approval is required to make it legally binding.

. . . .

The third critical issue before us is to ensure that the Protocol fully accounts for carbon absorbing sinks, such as forests and farmlands. Guided by science, we must ensure that we provide appropriate incentives for protecting our forests from deforestation; promoting afforestation and reforestation; and improving forest and agricultural conservation practices.

Finally, the Kyoto architecture must rest on a solid foundation of compliance. Already, the Protocol contains numerous building blocks that promote compliance, including provisions on measurement, reporting, and in-depth reviews. To realize the Protocol's environmental objectives, these must be supplemented by additional substantive rules, procedures, and non-compliance consequences. The United States urges this Conference to set in motion an expedited process to build a compliance regime that is strong, coherent and effective.<sup>6</sup>

On the last day of the conference, the parties agreed on a two-year action plan for adopting operational rules for implementing the Kyoto Protocol, including rules relating to the three market-based mechanisms.<sup>7</sup>

#### *WTO Panel Report on Turtle/Shrimp Import Restrictions*

On October 12, 1998, the WTO Appellate Body issued an important report in a dispute brought by Malaysia, Pakistan, and Thailand against the United States concerning U.S.

<sup>6</sup> Stuart Eizenstat, Under Secretary of State for Economic, Business, and Agricultural Affairs, *Remarks at the UNFCCC Fourth Conference of the Parties* (Nov. 12, 1998) ([http://www.state.gov/www/policy\\_remarks/1998/981112\\_eizen\\_climate.html](http://www.state.gov/www/policy_remarks/1998/981112_eizen_climate.html)).

<sup>7</sup> William K. Stevens, *Deadline Set to Form Rules for Reducing Gas Emissions*, N.Y. TIMES, Nov. 15, 1998, §1, at 11; Joby Warrick, *160 Nations Endorse Pact on Global Warming Compliance*, WASH. POST, Nov. 15, 1998, at A6.

import restrictions on shrimp and shrimp products.<sup>1</sup> The report found that the United States could restrict imports of shrimp and shrimp products under the General Agreement on Tariffs and Trade (GATT)<sup>2</sup> where such measures (1) were necessary to protect human, animal or plant life or health; or (2) related to the conservation of exhaustible natural resources, and if such measures are made effective in conjunction with restrictions on domestic production or consumption.<sup>3</sup>

The Appellate Body also found, however, that the United States *violated* the GATT when prohibiting the import of certain shrimp and shrimp products for environmental reasons because it did so in a manner that constituted arbitrary and unjustifiable discrimination.<sup>4</sup> Part of this discrimination derived from prohibiting imports of shrimp harvested by the commercial shrimp trawlers of certain countries, even though those vessels were using turtle-excluder devices comparable to those considered acceptable for U.S. vessels.<sup>5</sup> Furthermore, the report cited various international environmental instruments to find that such conservation measures call for *cooperative* efforts among countries, not unilateral action.<sup>6</sup> It recommended that the United States bring the manner in which its import restrictions are implemented into conformity with its WTO obligations but left it to the United States to determine how to respond.

The reaction of the U.S. Trade Representative, as set forth in a press release, was as follows:

"The Appellate Body has rightly recognized that our Shrimp-Turtle law is an important and legitimate conservation measure, and not protectionist," said U.S. Trade Representative Charlene Barshefsky. "But we disagree with the Appellate Body's assessment that we have not implemented the law in an even-handed manner."

Ambassador Barshefsky said that the Administration will be consulting with Congress and interested members of the public, and reviewing its options for responding to the report. She also stated, "This Administration is committed to the highest levels of environmental protection and the protection of endangered species, including sea turtles. The Appellate Body report does not suggest that we weaken our environmental laws in any respect, and we do not intend to do so. We will evaluate our options in light of what best achieves our firm objective of protecting endangered sea turtles."<sup>7</sup>

### *High Seas Fishing*

The 1982 UN Law of the Sea Convention entered into force on November 16, 1994.<sup>1</sup> However, it contains only very general provisions on the conservation of fish stocks present on the high seas. To address this concern, various regional organizations have

<sup>1</sup> Report of the Appellate Body, United States-Import Prohibition of Certain Shrimp and Shrimp Products (AE-1998-4), WTO Doc. No. WT/DS58/AB/R (Oct. 12, 1998) [hereinafter WTO Panel Report]. The U.S. import restrictions are contained in §609 of Pub. L. No. 101-162, 103 Stat. 988 (1989).

<sup>2</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 187.

<sup>3</sup> *Id.*, Art. XX(b) & (g).

<sup>4</sup> WTO Panel Report, *supra* note 1, para. 187(c). Article XX of the GATT requires that the environmental and conservation measures be nondiscriminatory and nonarbitrary. Prior decisions by GATT panels concerning environmental and conservation measures have repeatedly criticized governments for using such measures to deprive foreigners of their international rights. See VED P. NANDA, INTERNATIONAL ENVIRONMENTAL LAW & POLICY 45-53 (1995).

<sup>5</sup> WTO Panel Report, *supra* note 1, para. 165.

<sup>6</sup> *Id.*, para. 168.

<sup>7</sup> WTO Appellate Body Finds U.S. Sea Turtle Law Meets WTO Criteria But Faults U.S. Implementation, USTR Press Release No. 98-92 (Oct. 12, 1998).

<sup>1</sup> UN Convention on the Law of the Sea, adopted Dec. 10, 1982, S. TREATY DOC. NO. 103-39 (1994), reprinted in 21 ILM 1261 (1982).

been established, such as the Northwest Atlantic Fisheries Organization (NAFO), the International Commission for the Conservation of Atlantic Tunas (ICCAT), and the Commission for the Conservation of Antarctic Living Marine Resources (CCALMR). A further UN agreement on conservation of straddling and highly migratory fish stocks on the high seas was concluded in 1995, although this convention has not yet entered into force.<sup>2</sup> Several states have not joined these regional organizations and have not signed the UN agreement, leading to disputes between states concerned with conserving fish on the high seas and states whose vessels engage in high seas fishing.<sup>3</sup>

At a World Wildlife Fund Conference in Lisbon on September 15, 1998, Mary Beth West, the U.S. Deputy Assistant Secretary for Oceans, Fisheries, and Space, delivered a speech entitled "New International Initiatives to Restore and Sustain Fisheries," which focused on the problem of fishing by vessels of countries that are not members of relevant regional fisheries organizations. She stated:

These organizations provide structure for cooperation in international fisheries conservation, management and enforcement. Membership in such organizations entails both benefits and obligations. Unfortunately, given the present depleted status of many fish stocks throughout the world, fishing opportunities are—or should be—limited. Thus, regional fisheries organizations and arrangements have adopted a host of conservation and management measures designed to restore depleted fish stocks. These measures include reduced quotas, restrictions on fishing time and effort, minimum fish sizes, restrictions on fishing gear, closed spawning areas and others.

Turning to the issue of nonmembers, West described such states as "essentially free riders—enjoying the benefits of conservation efforts and scientific research undertaken by members without bearing any of the obligations." Since fishing by nonmembers can significantly diminish the effectiveness of conservation and management measures adopted by regional fishery organizations, West noted that the organizations have responded in two ways. First, some organizations have imposed trade sanctions on nonmember states, such as prohibiting the import of fish harvested by them. Second, some organizations have restricted landings of fish caught by nonmember vessels. For instance, under a scheme developed by NAFO in 1997, if a nonmember vessel sighted fishing in the NAFO regulatory area later enters a port of a NAFO member, the NAFO member may not permit the vessel to land or transship any fish until the vessel has been inspected. If the inspection shows that the vessel has any species on board regulated by NAFO, landings and transshipments are prohibited unless the vessel can demonstrate that the species were harvested either outside the regulatory area or otherwise in a manner that did not undermine NAFO rules.

West then considered the legal right of members of such organizations to take these actions against nonmembers:

The 1982 United Nations Convention on the Law of the Sea recognizes the right of all States for their vessels to fish on the high seas, but makes this right subject to certain important limitations. In particular, the freedom of high seas fishing is now qualified by the duty of conservation—all States must take, or cooperate with other States in taking, conservation measures for their respective nationals as may be necessary for the conservation of living marine resources of the high seas.

<sup>2</sup> UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 34 ILM 1542 (1995).

<sup>3</sup> See, e.g., *Fisheries Jurisdiction (Spain v. Can.)*, Jurisdiction (Int'l Ct. Just. Dec. 4, 1998) (<http://www.icj-cij.org>) (dismissing on jurisdictional grounds Spain's application against Canada for seizing a Spanish fishing vessel on the high seas).

This general duty to conserve has not, however, prevented overfishing. To give needed specificity to this duty and to reverse the global trend of declining fish stocks, the international community adopted the 1995 UN Fish Stocks Agreement. One of the Agreement's most important contributions to international fishery conservation is the following proposition: only States that are members of regional organizations, or which agree to apply the fishing rules established by such organizations, shall have access to the fishery resources regulated by such organizations.

Let us be clear about the import of this proposition—the living resources of the high seas are no longer open to “free for all” harvesting. If a regional fishery organization has set rules to regulate high seas fishing, only those States whose vessels abide by the rules may participate in the fishery.

Although the UN Fish Stocks Agreement is not yet in force, the United States believes that the actions taken by ICCAT, NAFO, and CCALMR, and being considered by the North-East Atlantic Fisheries Commission, to deal with nonmember fishing activity, are consistent with that Agreement. Today, the freedom to fish on the high seas today carries a clear duty—to cooperate in the conservation of fishery resources. In short, the Agreement is the international community's declaration that free riders whose fishing activities undermine the effectiveness of regional conservation measures will no longer be tolerated.<sup>4</sup>

#### PEACEFUL SETTLEMENT OF DISPUTES

##### *Tripartite Gold Agreement*

In January 1946, in the aftermath of the Second World War, the Allied states entered into an agreement with states that had been under Nazi occupation regarding reparations, including the restitution of monetary gold seized by the Nazis and recovered by the Allied states.<sup>1</sup> The agreement called for the creation of the Tripartite Commission for the Restitution of Monetary Gold, which was established by France, the United Kingdom, and the United States on September 27, 1946. On September 9, 1998, those three Governments issued the following joint statement on the dissolution of the Tripartite Commission:

1. The Governments of France, the United Kingdom, and the United States today announce the closure of the Tripartite Commission for the Restitution of Monetary Gold. The Governments established the Commission in Brussels on 27 September 1946 to help them fulfill their duties under Part III of the Paris Agreement of 1946. A joint announcement published by the three Governments formally established the Commission and set forth its Terms of Reference. Consistent with the Agreement's goal of arranging “an equitable procedure for the restitution of monetary gold” which would be pooled and distributed among participants in proportion to their losses, the three Governments charged the Commission with receiving claims for looted monetary gold, adjudicating those claims, and making distributions from the monetary gold pool assembled by the Governments.

2. The Commission received claims from Albania, Austria, Belgium, Czechoslovakia, Greece, Italy, Luxembourg, the Netherlands, Poland and Yugoslavia. Following extensive deliberations conducted in accordance with its Terms of Reference, the Commission established as valid claims amounting to 16,527,422.101 troy ounces/514,060.2909 kgs of gold. In reaching its determinations, the Commission treated its adjudicatory responsibilities with the utmost care and diligence, and each

<sup>4</sup> Mary Beth West, *New International Initiatives to Restore and Sustain Fisheries* (Sept. 15, 1998) (on file at GWU).

<sup>1</sup> Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Jan. 14, 1946, 61 Stat. 3157, 555 UNTS 69.

claim received the Commission's close and deliberate attention. In accordance with the Commission's Terms of Reference, the costs of running the Tripartite Commission were deducted from the gold pool. The total gold deducted for this purpose was 43,880.424 troy ounces/1,364.8337 kgs, some 0.406% of the gold pool.

3. With one exception, all distributions from the gold pool have now been concluded and waivers of claims have been received from each of the recipient countries. A small remaining share of gold and currency allocated to the successor states of the former Yugoslavia has not yet been distributed, but will be held by the three Governments pending agreement among those successor states on its disposition. The Commission has delivered a final report on its work to the three Governments, which have in turn arranged for its delivery to each of the parties to the Paris Agreement. Accordingly, the Commission's work is now completed, and its archives have been transferred to Paris, and will be made available to the public.

4. The Tripartite Commission was able to meet about 64 percent of the validated claims on the gold pool. The three Governments had assembled the gold pool from various sources found on territories previously under the control of Nazi Germany and from certain third countries to which gold had been transferred from Germany. Through these combined efforts, the Governments were able to assemble a monetary gold pool amounting to 10,817,021.139 ounces/336,446.97 kgs.

5. In the view of the three Governments, it is appropriate under the circumstances that prevail today—over 50 years after the conclusion of the Paris Agreement—to consider the process of collecting gold for the gold pool complete. At the same time, the three Governments remain mindful of the possibility that additional Nazi-looted gold could yet come to light. The three Governments envisage that any such gold would be handled in a manner consistent with the Paris process.<sup>2</sup>

#### *Peru-Ecuador Border Agreement*

On October 16, 1998, the Congresses of Peru and Ecuador agreed to give Argentina, Brazil, Chile, and the United States the power to impose a definitive solution to resolve the long-standing forty-nine-mile border dispute between Peru and Ecuador. The border dispute twice provoked armed conflict and a significant arms race between the two nations.<sup>1</sup>

After mediation efforts, the Presidents of Peru and Ecuador on October 26 signed an agreement that resolved the border conflict. The agreement (1) reaffirms a 1942 protocol that declared most of the disputed territory as part of Peru; (2) permits Ecuador to exercise control over a small enclave in Peruvian territory where Ecuador will build a monument to its war dead; (3) demilitarizes a fifty-mile stretch of the border; and (4) provides for a transition in the border area from monitoring by peacekeepers of the four guarantor nations to monitoring by police and park rangers in two national parks on each side of the border. In addition, the two countries signed commercial treaties granting Ecuador trade and navigational access to economically important shipping routes in Peru's Amazon territory.<sup>2</sup>

U.S. Secretary of State Madeleine Albright commented on the resolution of this dispute in an editorial submitted to the Miami-based *Diario Las Américas*:

<sup>2</sup> *Special Notice: Dissolution of the Tripartite Gold Commission*, U.S. DEP'T ST. DISPATCH, Oct. 1998, at 24 (footnote omitted).

<sup>1</sup> Diana Jean Schemo, *Peru and Ecuador Agree to Put Border Dispute in Outsiders' Hands*, N.Y. TIMES, Oct. 18, 1998, §1, at 6.

<sup>2</sup> Treaty of Trade and Navigation, Oct. 26, 1998, Peru-Ecuador, 38 ILM 266 (1999); Anthony Faiola, *Peru, Ecuador Sign Pact Ending Border Dispute*, WASH. POST, Oct. 27, 1998, at A20; *Peru and Ecuador Sign Treaty to End Longstanding Conflict*, N.Y. TIMES, Oct. 27, 1998, at A3.



On October 26 Peru and Ecuador took a major step forward to a more peaceful and prosperous future when President Fujimori and President Mahuad signed an agreement that ended over fifty years of border strife. The agreement they signed was notable for many reasons. The signing resolved the most dangerous border dispute extant in Latin America. In 1941, 1981, and 1995 these two neighbors engaged in armed conflict along their border. These clashes have caused hundreds of casualties, disrupted the economic and diplomatic relations of both countries, and distracted attention from the serious social problems afflicting people on both sides of the border. The distrust that was sowed between these two brother nations also hindered the sort of free and open trade that is the key to prosperity in the modern world.

The agreement was also notable for the creative diplomacy behind it. Six decades of conflict and suspicion had left what was considered by many an intractable problem. The four guarantor nations of the Rio Protocol of 1942, Argentina, Brazil, Chile, and the United States, worked together with the diplomats of Ecuador and Peru to shape a comprehensive agreement. For 3½ years this group of hemispheric diplomats worked tirelessly to defend international law, respect the sovereign rights of both nations, and develop common goals that would ensure a lasting peace. The comprehensive agreement that was reached not only resolved the question of fixing the land border, but established mechanisms to guarantee Ecuador's access to the Amazon, to defuse security concerns, and to open their common border to trade and development that will improve the lives of people on both sides. The site of the most intense combat will become adjacent demilitarized parks that will preserve the unique biodiversity of that remote jungle region.<sup>3</sup>

#### ARMS CONTROL AND NATIONAL SECURITY LAW

##### *India-Pakistan Nuclear Weapons Tests*

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) calls upon states to work toward nuclear disarmament, while at the same time preserving the right of five (and only five) member states to possess nuclear weapons (China, France, Russia, the United Kingdom, and the United States).<sup>1</sup> In 1995, the NPT was extended indefinitely and unconditionally. In 1996, a Comprehensive Nuclear Test Ban Treaty (CTBT) was opened for signature.<sup>2</sup> India and Pakistan joined neither the NPT nor the CTBT.

On May 11 and 13, 1998, India conducted five underground nuclear weapons tests (its first nuclear weapons test occurred in 1974).<sup>3</sup> On May 28 and 30, Pakistan carried out underground nuclear tests as well. Those actions immediately triggered sanctions against both nations under U.S. foreign relations laws.<sup>4</sup> Intense bilateral and multilateral diplomacy ensued. Both countries eventually announced that they would voluntarily refrain from further tests and that they intended to adhere to the CTBT by September 1999.

<sup>3</sup> Madeleine K. Albright, *Op Ed on "Peru and Ecuador"* (Oct. 31, 1998) (<http://secretary.state.gov/www/staterements/1998/981031.html>).

<sup>1</sup> *Id.*, 1, 1968, 21 UST 483, 729 UNTS 161.

<sup>2</sup> *Id.*, opened for signature Sept. 10, 1996, GA Res. 50/245 (1996).

<sup>3</sup> For India's position on its right to conduct such tests, see Jaswant Singh, *Against Nuclear Apartheid*, FOREIGN AFF. Sept.-Oct. 1998, at 41.

<sup>4</sup> In accordance with the Arms Export Control Act, §102(b), 22 U.S.C. §2799aa-1(b) (1994), President Clinton reported to Congress on May 13 (with regard to India) and May 30 (with regard to Pakistan) his determinations that those non-nuclear weapons states had each detonated a nuclear explosive. The President directed that the relevant agencies and instrumentalities of the United States impose the sanctions described in section 102(b)(2) of the Act. The detonations also triggered sanctions against both nations under the Export-Import Bank Act of 1945, §2(b)(4), as amended, 12 U.S.C.A. §635(b)(4) (West Supp. 1998).

To assist in such diplomacy, legislation was enacted in November 1998 to provide the President with the authority to lift certain of these sanctions.<sup>5</sup> Thereafter, the President waived sanctions against India and Pakistan with respect to activities of the Export-Import Bank, the Overseas Private Investment Corporation, and the Trade and Development Agency. The President also restored military education and training programs for both countries and allowed U.S. banks to make loans and provide credit to their governments. Finally, he authorized U.S. officials to vote at international financial institutions in favor of extending loans or financial or technical assistance to Pakistan.<sup>6</sup> Prohibitions on sales of military and military/civilian ("dual use") items to the two countries remained in place.

On November 12, 1998, Deputy Secretary of State Strobe Talbott addressed the U.S. position on India and Pakistan's status as nuclear weapons states:

Now, I can understand how, from an Indian or Pakistani vantage point, the monopoly of the five NPT nuclear weapons states might look discriminatory. But I would also hope that over time Indians and Pakistanis would not try to redress what they might see as a historical injustice by embracing "the Bomb" just as the rest of the world is trying to wean itself off of the view that "the Bomb" bestows either safety or stature on those who possess it.

We Americans take seriously our own obligations in this regard, and we believe we are meeting them. The U.S. and Russia have already dismantled or de-activated 18,000 nuclear weapons; we are prepared to cut the U.S. and Russian strategic arsenals by 80% from their Cold War levels. We've also cut our stockpiles of shorter-range tactical nuclear weapons by 90%.

So when we urge the Indians and Pakistanis to call off their own nuclear-arms and ballistic missile race before it's too late, we are practicing what we preach. And when we urge nuclear restraint and warn about the nuclear danger, it is not from a position of smug superiority. Rather, it's from a position of having been there and done that; we're trying to share the cautionary lessons of our own experience.

. . . .

Let me turn now to the sanctions that the U.S. imposed on both countries in the wake of the tests. They were necessary for several reasons. First, it's the law. Second, sanctions create a disincentive for other states to exercise the nuclear option if they are contemplating it. And third, sanctions are part of our effort to keep faith with the much larger number of nations that have renounced nuclear weapons despite their capacity to develop them. Several of those nations are living proof that having nuclear weapons is not a prerequisite for survival or security.

... [W]e have decided to resume support for U.S. business and investment through programs under the auspices of the Overseas Private Investment Corporation, the Ex-Im Bank, and the Trade and Development Agency. The U.S. also decided to waive restrictions on lending by private U.S. banks and to bolster our military-to-military contacts by restoring modest education and training programs. Finally, we have signaled our support for the IMF's efforts to help Pakistan avert a total economic collapse.

As for the concern and the criticism that the U.S. has reacted unilaterally to the challenge posed by the tests, nothing could be further from the truth. From the outset, we have been working in concert with many other countries.

<sup>5</sup> India-Pakistan Relief Act of 1998, §902, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

<sup>6</sup> Steven Erlanger, *U.S. to Lift Some Sanctions against India and Pakistan*, N.Y. TIMES, Nov. 7, 1998, at A4; Thomas W. Lippman, *U.S. Lifts Sanctions on India, Pakistan*, WASH. POST, Nov. 7, 1998, at A14; Richard W. Stevenson, *I.M.F. Agrees to Resume Pakistan Aid, Cut Off After Atom Tests*, N.Y. TIMES, Nov. 26, 1998, at A17.

Let me be more specific. The UN Security Council, the Group of Eight major industrialized nations, and the P-5 [five permanent members of the Security Council] have each endorsed a set of benchmarks that provide for the Indians and Pakistanis a map of the path away from the nuclear brink and back into the mainstream of those countries that are part of the solution to the problem of proliferation rather than being part of the problem itself. An unprecedented ad-hoc task force of over a dozen nuclear and non-nuclear weapons states, including several that abandoned nuclear-weapons aspirations or status—countries such as Brazil, Argentina and Ukraine—joined in forging a common response. So have regional groupings such as the European Union, the Organization of American States, the ASEAN Regional Forum, the Gulf Cooperation Council, the Organization of the Islamic Conference, and several others.

Two principles have guided the American side of this effort:

First, we remain committed to the common position of the P-5, G-8, and South Asia Task Force, notably including on the long-range goal of universal adherence to the Nuclear Non-Proliferation Treaty. We do not and will not concede, even by implication, that India and Pakistan have established themselves as nuclear-weapons states under the NPT. Unless and until they disavow nuclear weapons and accept safeguards on all their nuclear activities, they will continue to forfeit the full recognition and benefits that accrue to members in good standing of the NPT.

Our second principle applies to the near and medium term, and to the practice of diplomacy as the art of the possible. We recognize that any progress toward a lasting solution must be based on India's and Pakistan's conceptions of their own national interests. We're under no illusions that either country will alter or constrain its defense programs under duress or simply because we've asked it to. That's why we've developed proposals for near-term steps that are, we believe, fully consistent with the security requirements that my Indian and Pakistani counterparts articulated at the outset of our discussions. The Prime Ministers of both nations have said publicly that they seek to define those requirements at the lowest possible levels.

In other words, while universal NPT adherence remains our long-term goal, we are not simply going to give India and Pakistan the cold shoulder until they take that step. We are working intently with both countries to encourage them to take five practical steps that would help avoid a destabilizing nuclear and missile competition and more generally reduce tensions on the subcontinent and bolster our global non-proliferation goals. Let me say a few words on each step.

First, we have urged India and Pakistan to sign and ratify the Comprehensive Test Ban Treaty, or CTBT. . . .

The second step we are urging India and Pakistan to take in the near future is to halt all production of fissile material, which constitutes the essential building block of nuclear weapons. . . .

The third key objective of our discussions with the Indians and the Pakistanis involves limitations on the development and deployment of missiles and aircraft capable of carrying weapons of mass destruction.<sup>7</sup>

The Prime Ministers of India and Pakistan agreed on February 21, 1999, to take steps to reduce the risk of nuclear war, including bilateral discussions in areas of friction, measures to prevent the accidental launching of nuclear weapons, notification of any accidental

<sup>7</sup> George Talbott, *U.S. Diplomacy in South Asia: A Progress Report*, DEP'T ST. DISPATCH, Dec. 1998, at 16.

incident that might create the risk of nuclear fallout, and notification of the testing of ballistic missiles. The two countries, however, did not jointly agree to sign the CTBT.<sup>8</sup>

In 1990, when the President could no longer certify to Congress that Pakistan did not possess a nuclear explosive device, restrictions were triggered under U.S. law prohibiting the transfer to Pakistan of military equipment and technology.<sup>9</sup> Among other things, these restrictions prevented delivery of F-16 aircraft that Pakistan had contracted to purchase in the late 1980s. In December 1998, the United States announced that it had agreed to pay Pakistan several hundred million dollars to settle the matter.<sup>10</sup>

<sup>8</sup> Barry Bearak, *India Promises, With Pakistan, to Seek Peace*, N.Y. TIMES, Feb. 22, 1999, at A1.

<sup>9</sup> Such exports were prohibited under U.S. foreign assistance legislation once the President could no longer certify to Congress that Pakistan did not possess a nuclear explosive device. Section 620E(e) of the Foreign Assistance Act of 1961, 22 U.S.C. §2375 (1998).

<sup>10</sup> The central element of the settlement agreement was the payment of approximately \$324 million from the "Judgment Fund," an open-ended appropriation of funds available to pay final judgments, awards and compromise settlements under certain circumstances. 31 U.S.C. §1304(a); 28 U.S.C. §2414 (1994).

## INTERNATIONAL DECISIONS

EDITED BY BERNARD H. OXMAN

*ICJ jurisdiction under the optional clause—relevance of legality of acts to validity of reservation to jurisdiction made in contemplation of such acts—high seas—conservation and management measures.*

FISHERIES JURISDICTION (Spain v. Canada), Jurisdiction. <<http://www.icj-cij.org>>. International Court of Justice, December 4, 1998.

On May 10, 1994, Canada filed an amended declaration accepting the jurisdiction of the International Court of Justice (ICJ). New paragraph 2(d) excluded "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures." Two days later, the Canadian Coastal Fisheries Protection Act (CFPA) and implementing regulations were amended to authorize the enforcement under certain circumstances of conservation measures applicable to foreign fishing vessels in the high seas areas to which the reservation adverted.<sup>1</sup>

On March 9, 1995, the Canadian Coast Guard arrested the Spanish trawler *Estai* on the high seas outside Canada's 200-mile exclusive economic zone (EEZ), in the regulatory area of the Grand Banks (Nose and Tail) of the Northwest Atlantic Fisheries Organization (NAFO).<sup>2</sup> In response to vigorous protests by Spain<sup>3</sup> and the European Commission, Canada stated that the *Estai*'s arrest "was necessary in order to put a stop to the overfishing of Greenland halibut [turbot] by Spanish fishermen."<sup>4</sup> On March 28, 1995, relying on Article 36(2) of the ICJ Statute, Spain instituted proceedings contesting Canada's seizure of the *Estai* on the high seas.<sup>5</sup> On April 20, 1995, Canada and the European Community signed an Agreed Minute on the Conservation and Management of Fish Stocks,<sup>6</sup> as a result of which Canada repealed the application of its regulations to

<sup>1</sup> For the Canadian reservation, see *Multilateral Treaties Deposited with the Secretary-General* <<http://www.un.org>>. For the CFPA amendments of May 12, 1994, see R.S.C., ch. C-33 (1985), reprinted in 33 ILM 1383 (1994), UNITED NATIONS, LAW OF THE SEA BULL., No. 26, Oct. 1994, at 20, and Judgment, paras. 15-18, 22. It may be noted that enactment by Canada on June 26, 1970, of its Arctic Waters Pollution Prevention Act, reprinted in 9 ILM 543 (1970), and fisheries legislation, *id.* at 553, had been preceded on April 7, 1970, by a new reservation by Canada to its optional clause declaration, *id.* at 598.

<sup>2</sup> Canada is the only coastal state party, while the European Union is among 14 distant-water fishing parties to the NAFO Convention of Oct. 24, 1978, 1978 O.J. (L 378) 1 (entered into force Jan. 1, 1979).

<sup>3</sup> By means of two Notes Verbales to Canada of March 27 and April 7, 1995, Spain reiterated its claims that Canada's actions not only were in breach of general international law, but also endangered the efforts of the international community to secure broader fisheries cooperation. 1 Memorial of Spain, Annexes 3-4 (1995).

<sup>4</sup> Quoted in Application of Spain, Annex 4 (1995), and 1 Memorial of Spain, *supra* note 3, Annex 9; see Judgment, para. 20.

<sup>5</sup> After Spain filed its Memorial (on September 29, 1995) and Canada filed its Counter-Memorial (on February 29, 1996) on the jurisdiction of the Court, Spain asked for permission to file a Reply. Canada opposed the request. In its Order of May 8, 1996, by a vote of 15-2, the Court found itself to be sufficiently informed, at this stage, of the contentions of fact and law on which the parties were relying, and therefore decided not to authorize the filing of a Reply and a Rejoinder.

<sup>6</sup> 33 ILM 1260 (1995). See Judgment, para. 21.

Spanish and Portuguese vessels and discontinued proceedings against the *Estai* and its master.<sup>7</sup> On December 4, 1998, the Court decided by 12 votes to 5 that it lacked jurisdiction over the dispute.

Spain carefully framed its Application in an effort to avoid Canada's reservation to the Court's jurisdiction. It did not characterize the dispute as arising from Canada's conservation and management measures as such but, rather, from the assertion of jurisdiction over the high seas in the Canadian legislation constituting their frame of reference. The Court was asked to adjudge and declare that Canada's legislation, insofar as it claimed to exercise jurisdiction over foreign ships on the high seas, was not "opposable" to Spain; that Canada was bound to refrain from any repetition of the acts complained of and to make reparation; and that the boarding of the *Estai*, the measures of coercion and the exercise of jurisdiction over the ship and its captain violated the freedoms of navigation and fishing on the high seas, the prohibition on the threat or use of armed force, and various other principles. For its part, Canada regarded the dispute as arising out of and concerning its conservation and management measures and their enforcement, and accordingly as covered by its reservation to jurisdiction.

The Court commenced its analysis by setting out the differences in the perceptions of the parties as to the subject of their dispute. The Court noted that Article 40(1) of the Statute and Article 38(2) of the Rules of Court indicate the importance of the terms of the Application, stating that these provisions had proved "essential from the point of view of legal security and the good administration of justice."<sup>8</sup> Nevertheless, the terms of the Application alone or, more generally, the claims of the applicant cannot confine the Court if there are disagreements over the real subject of the dispute or the exact nature of the claims submitted to it. As its jurisprudence shows, one of the attributes of its judicial function is that the Court, while giving particular attention to the applicant's formulation, may determine the content and character of the dispute objectively, by examining the positions of both parties and the pertinent evidence.<sup>9</sup>

The Court characterized the dispute as having resulted from the specific Canadian actions on the high seas in relation to the pursuit of the *Estai*, the means used to accomplish its arrest, the fact of its arrest, and the detention of the vessel and arrest of its master, which were taken pursuant to Canada's amended CFPA and implementing regulations. The essence of the dispute was whether these acts violated Spain's rights under international law and required reparation.<sup>10</sup> By this finding, the Court rejected

<sup>7</sup> Parallel to the proceedings before the Court and diplomatic activity pursued within the United Nations system, NAFO agreed in September 1995 to apply (as of January 1, 1996) to all NAFO members new stringent control and enforcement measures, most of which were adopted in the Canada-EC agreement, *supra* note 6, Annex I, as part of the settlement of the "turbot war." See 34 ILM at 1264. The sharing of turbot quotas on the Nose and Tail of the Grand Banks was also resolved in line with that agreement. In addition, work was initiated on two proposals advocated by Canada and the European Union with respect to effective dispute settlement procedures within the NAFO system. See UN Doc. A/50/98-S/1995/252; IMO Doc. MSC 65/25, at 77, & Add.2, and Annexes 46 (Spain), 47 (Canada) (1995); Report of the 17th NAFO General Council, NAFO/GC Doc. 95/5 (1995); Report of the 18th NAFO General Council, NAFO/GC Doc. 96/9, at 13-17 (1996); Report of the 20th NAFO General Council, NAFO/GC Doc. 98/7, at 64-69 (1998). These developments were closely intertwined with the preparation and adoption, as well as the subsequent implementation and application, of the milestone Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, reprinted in 34 ILM 1542 (1995) [hereinafter Straddling Stocks Agreement]. As of November 30, 1998, the Agreement had been signed by 58 states and the European Community, and it had been ratified by 18 states (including the United States). See UN, LAW OF THE SEA BULL., No. 38, 1998, at 20.

<sup>8</sup> Judgment, para. 29.

<sup>9</sup> See *id.*, paras. 29-32 and jurisprudence cited therein.

<sup>10</sup> *Id.*, paras. 33-35. See also paras. 63, 87.

Spain's submission on the dichotomy between a Europe-Canada dispute over fisheries and a Spain-Canada dispute over general international law.<sup>11</sup>

The Court concluded that all the elements in a declaration under Article 36(2) of the Statute are to be interpreted as a unity, even when—as in the present case—the relevant expression of a state's consent to the Court's jurisdiction, and the limits to that consent, modify an earlier and broader expression of consent. There is no reason to interpret a new reservation restrictively. The Judgment reaffirms the *Cameroon v. Nigeria (Preliminary Objections)* findings that a declaration under Article 36(2) "makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance" and that the provisions of the 1969 Vienna Convention on the Law of Treaties apply only analogously to the interpretation of optional clause declarations, to the extent compatible with their *sui generis* character as unilateral acts of state sovereignty.<sup>12</sup> The Judgment also reaffirms the pronouncements in the *Anglo-Iranian Oil Co., Certain Norwegian Loans* and *Aegean Sea* cases that a declaration, including a reservation contained therein, must be interpreted in a natural and reasonable way, having due regard to the intention of the state concerned at the time when it accepted the Court's compulsory jurisdiction.<sup>13</sup>

In this case, apart from evidence in the form of Canadian ministerial statements, parliamentary debates, legislative proposals and press communiqués, the Court could deduce the reserving state's intention by comparing the 1994 declaration containing the reservation in question with Canada's preceding optional clause declaration. The Court gave primary importance to the effect sought by the reserving state. It rejected application of the *contra proferentem* rule advocated by Spain.<sup>14</sup>

The reliance of the Court on "the principle of interpretation whereby a reservation to a declaration of acceptance of the compulsory jurisdiction of the Court is to be interpreted in a natural and reasonable way, with appropriate regard for the intentions of the reserving State and the purpose of the reservation,"<sup>15</sup> also resulted in its rejection of Spain's contention that the Canadian reservation conflicted with principles of international law. It held that the legality under international law of the acts exempted from the jurisdiction of the Court cannot be considered in interpreting such reservations.<sup>16</sup> The fact that a state may lack confidence about the legality of certain of its actions may sometimes be the very reason, or one of the reasons, that it made the reservation. This does not, in the Court's view, operate as an exception to the principle of consent to ICJ jurisdiction and the freedom to enter reservations.<sup>17</sup> Spain's confusion of the legality of

<sup>11</sup> *Id.*, para. 27. The dichotomy was rooted in Spain's contention that the present dispute could not concern the management and conservation of fish stocks, because these matters fell outside the jurisdiction of the EU member states as a result of their having transferred their competence over fisheries to the European Union. See ICJ Docs. CR 98/3, at 13, 35–39, CR 98/12, at 44–53, CR 98/13, at 11–12, 25–28, and CR 98/14 (trans. 1998).

<sup>12</sup> Judgment, para. 46 (quoting *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment, paras. 25, 30 (June 11, 1998)).

<sup>13</sup> *Id.*, paras. 47–49 (quoting *Anglo-Iranian Oil Co. case (UK v. Iran)* (Jurisdiction), 1952 ICJ REP. 93, 104, 105, 107 (July 22); *Certain Norwegian Loans (Fr. v. Nor.)*, Judgment, 1957 ICJ REP. 9, 27 (July 6); and *Aegean Sea Continental Shelf (Greece v. Turk.)*, Judgment, 1978 ICJ REP. 3, 69 (Dec. 19)).

<sup>14</sup> *Id.*, paras. 43, 51–52.

<sup>15</sup> *Id.*, para. 54.

<sup>16</sup> *Id.* (quoting *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392, 418 (Nov. 26)). It was their disagreement on this point—especially in a context where the reservation clearly contemplated the illegal acts challenged on the merits—that particularly prompted Vice-President Weeramantry and Judges Bedjaoui, Ranjeva and Vereshchetin and Judge *ad hoc* Torres Bernárdez (designated by Spain) to dissent.

<sup>17</sup> *Id.*, para. 54. See Separate Opinion of President Schwebel, para. 4, adding that: "If States by their reservations could withhold jurisdiction only where their measures or actions are incontestably legal, and not withhold jurisdiction where their measures or actions are illegal or arguably illegal, much of the reason for making reservations would disappear." See also Separate Opinion of Judge Koroma; and Separate Opinion of Judge

the acts at issue with consent to jurisdiction disregarded a fundamental distinction between a state's acceptance of the Court's jurisdiction, which requires consent, and the compatibility of particular acts with international law, which can be determined only when the Court, having established its jurisdiction, deals with the merits of the case.<sup>18</sup>

The Court observed that, since paragraph 2(d) is the only new component distinguishing the 1994 declaration from its predecessor of 1985, this reservation is not only integral, but also essential to the current declaration, and hence to Canada's acceptance of the Court's compulsory jurisdiction.<sup>19</sup> It noted the close relationship between the reservation and the legislation protecting Canadian coastal fisheries, including the purpose of the former to prevent the Court from exercising its jurisdiction over matters that might arise with regard to the international legality of the latter.

As regards the fundamental issue of the meaning of the expression "conservation and management measures," the Court preferred the broad meaning ascribed to it by Canada as a "generic category" encompassing statutes, implementing regulations and administrative action, over the more restrictive interpretation advocated by Spain. Nothing permitted the Court to conclude that Canada had intended to use "conservation and management measures" in a sense that differs from the one commonly understood and generally accepted in international law and practice.<sup>20</sup> Moreover, Spain's contention that, since such measures must be interpreted in accordance with international law, they must exclude unilateral measures on the high seas, confuses two issues—the existence and content of the concept of conservation and management measures within the international system, which is a matter of definition, and the conformity of the measures with the international system, which is a matter of legality. The authority from which such measures derive, the area affected by them and the manner of their enforcement were found by the Court not to be the essential attributes of the concept in question but, in contrast, elements to be taken into consideration in determining the legality of such measures under international law.

In the context of its rejection of Spain's contention that Canada's reservation must be interpreted consistently with what is permissible under international law, the Court rejected Spain's reasoning that the scope of paragraph 2(d) and the related legislation (the CFPA) is restricted to vessels that are stateless or flying a flag of convenience.<sup>21</sup> It also rejected Spanish

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Kooijmans, para. 10, noting that when the law is in a state of flux, settlement of disputes by means other than judicial settlement may be more satisfactory for all states concerned, and that the Judgment, para. 56, refers in this respect to the principle of free choice of means contained in Article 33 of the United Nations Charter.

<sup>18</sup> Judgment, paras. 55–56. See also paras. 60, 79, 85. According to the Court, the language from *Right of Passage over Indian Territory (Preliminary Objections)* relied on by Spain is concerned with a possible retroactive effect of a reservation and does not detract from this principle. Judgment, para. 53 (quoting Case concerning *Right of Passage over Indian Territory (Port. v. India) (Preliminary Objections)*, 1957 ICJ REP. 125, 142 (Nov. 26) ("It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.")).

<sup>19</sup> In his separate opinion, President Schwebel adds that, when the reservation has been treated by the declarant state as an essential one but for which the declaration would not have been made, the Court is not free to treat the reservation as invalid or ineffective while treating the remainder of the declaration as being in force. If paragraph 2(d) falls or fails, so must the entire 1994 Canadian declaration. Accordingly, if the Spanish argument is accepted on the results to be attached to Canada's interpretation of this reservation, it follows that there is no basis whatever in this case for the jurisdiction of the Court. Separate Opinion of President Schwebel, paras. 9–10.

<sup>20</sup> Judgment, para. 70, invoking the 1982 UN Law of the Sea Convention, the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, reprinted in 33 ILM 968 (1994), the 1995 UN Straddling Stocks Agreement, *supra* note 7, and other examples of treaty and legislative practice. See Separate Opinion of Judge Oda, paras. 8–15.

<sup>21</sup> President Schwebel supplements this finding with the reflection in his separate opinion that if it were accepted, *arguendo*, that Spain is correct that Canada's interpretation of its reservation as applicable to any vessel fishing in the NAFO Regulatory Area deprives the reservation of validity and makes it "a nullity," it would



arguments that the pursuit, boarding and seizure of the *Estai*, which entailed the use of force on the high seas, fall outside the reference to "the enforcement of such measures" in the reservation because they cannot be regarded as lawful enforcement measures under international law. In light of these conclusions, the Court did not consider further Spanish arguments that this use of force was necessarily contrary to international law and amounted in any event to a violation of Article 2(4) of the UN Charter. The use of force authorized by the Canadian legislation and regulations was found by the Court to be within the ambit of what is commonly understood as enforcement of conservation and management measures in terms of minimum use of force for the purposes of boarding, inspection and arrest of vessels, as expressly provided for by the 1995 Straddling Stocks Agreement (Article 22(1)(f)), and thus to fall within Canada's reservation to jurisdiction.<sup>22</sup>

Finally, the Court was unable to accept Spain's argument that paragraph 2(d) might be thought to have the characteristics of an "automatic reservation" and therefore be in breach of Article 36(6) of the Statute.<sup>23</sup> The Judgment points out that the Court had full freedom to interpret the text of the reservation, and that its reply to the question regarding its jurisdiction to entertain the present dispute depended solely on that interpretation.<sup>24</sup> Having concluded that it had no jurisdiction to adjudicate the dispute because it came within the terms of the reservation contained in paragraph 2(d) of Canada's declaration, the Court did not find it necessary to determine *proprio motu* whether or not that dispute was distinct from the dispute dealt with by the 1995 Canada-EC Agreement and whether or not the Court would have to find it moot.<sup>25</sup>

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The seventy-five-paragraph analysis that led the Court to the foregoing conclusion reveals concern for consistency of the Court's jurisprudence and meticulous care for the detailed aspects of the case.<sup>26</sup> The significance of the Judgment, like that in *Cameroon v. Nigeria*,<sup>27</sup> for the consent-based system of compulsory jurisdiction under Article 36(2) of the Statute largely consists in confirmation and consolidation of that system as it has been developed in the law and practice of the Court.<sup>28</sup> The express confirmation in the Judgment and separate opinions that the legality under international law of the acts

no: follow that the Court has jurisdiction over Spain's cause of action. On the contrary, in his view it would mean that the Court is altogether without jurisdiction since the nullity or ineffectiveness of paragraph 2(d) would entail the nullity or ineffectiveness of the Canadian declaration as a whole. See Separate Opinion of President Schwebel, para. 7.

<sup>22</sup> The conclusion that the lawfulness of the acts that the reservation seeks to exempt from ICJ jurisdiction has no relevance to the interpretation of the terms of that reservation also led the Court to hold that it had no reason to reject Canada's objection to jurisdiction in preliminary proceedings on the grounds that the objection did not possess, in the circumstances of the case, an exclusively preliminary character.

<sup>23</sup> Judgment, para. 86.

<sup>24</sup> In this regard, President Schwebel observes that its proceedings and the resultant Judgment more than amply demonstrate that the Court freely considered whether it has jurisdiction, and that it concluded, for the reasons meticulously set out in the Judgment, which have nothing to do with "self-judging" reservations, that it does not. Separate Opinion of President Schwebel, para. 5.

<sup>25</sup> See Judgment, paras. 87-88 (citing cases). See also Separate Opinion of Judge Oda, paras. 17-21.

<sup>26</sup> Judgment, paras. 23-88.

<sup>27</sup> See Peter H. F. Bekker, Case note, 92 AJIL 751 (1998).

<sup>28</sup> See SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996*, at 727-836 (1997). For the list of 60 states that had made optional clause declarations as of August 1998, see Report of the International Court of Justice, 1 August 1997-31 July 1998, UN Doc. A/53/4, at 4 (1998) <<http://www.icj-cij.org>>. Two more declarations have been deposited, one by Guinea prior to its instituting a new case against Côte d'Ivoire, see ICJ Communiqué No. 98/46 (Dec. 30, 1998), and one by Yugoslavia prior to its instituting new cases against (separately) the United States and nine other NATO members, see ICJ Communiqués No. 99/17 (Apr. 29, 1999) and No. 99/18 (May 4, 1999), On the Legality of Use of Force (Provisional Measures), Orders (June 2, 1999), of which those in cases against the United States and Spain ordered their removal from the ICJ General List, see ICJ Communiqués No. 99/23-99/33 (June 2, 1999) <<http://www.icj-cij.org>>.

exempted from the jurisdiction of the Court cannot be considered in interpreting such reservations to jurisdiction, because such an approach confuses the legality of the acts at issue with consent to jurisdiction, is new and important.

The Court did not pass on the legality of the disputed Canadian acts against the *Estai* in the NAFO Regulatory Area of the high seas.<sup>29</sup> Nevertheless, its broad interpretation of the generic term "conservation and management measures" and its conclusion that the term "enforcement of such measures" contemplates a minimal use of force may have important implications for the law of the sea. And the written and oral proceedings will retain their value in one of the most widely publicized law of the sea disputes of our time.

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*International trade—WTO—quantitative restrictions—environmental protection—endangered species—U.S. import ban on shrimp*

UNITED STATES—IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS. WTO Doc. WT/DS58/AB/R.

World Trade Organization, Appellate Body, October 12, 1998.

In May 1996, the United States effectively prohibited imports of shrimp and shrimp products from all countries that do not require commercial shrimp trawlers to use turtle-excluder devices (TEDs) to permit endangered species of sea turtles to escape from trawling nets to avoid drowning.<sup>1</sup> In January 1997, India, Malaysia, Pakistan and Thailand requested that the WTO Dispute Settlement Body establish a panel to determine whether this import ban, among other things, violates the prohibition on quantitative restrictions in Article XI of GATT (1994). The United States maintained that its import ban was permitted under the exceptions set forth in paragraphs (b) and (g) of GATT Article XX.<sup>2</sup> Four turtle species<sup>3</sup> that migrate in and out of waters subject to the complaining parties' jurisdiction are listed as endangered under the Convention on International Trade in Endangered Species of Wild Fauna and Flora and are covered by the relevant U.S. regulation.

<sup>29</sup> See Bernard H. Oxman, *The Rule of Law and the United Nations Convention on the Law of the Sea*, in CONTEMPORARY INTERNATIONAL LAW ISSUES: CONFLICTS AND CONVERGENCE 309, 312–13 (1996), and in 7 EUR. J. INT'L L. 353, 357–58 (1996).

<sup>1</sup> These devices are relatively inexpensive, costing between \$75 and \$400 in the United States, although the "harder" varieties (which are increasingly being required) start in the \$200 range. Not much is known about the cost of TEDs in developing countries where labor is cheaper, although an Indian newspaper has stated that they are "inexpensive, costing only Rs 3,000" (around U.S. \$75), and a member of the U.S. National Marine Fisheries Service on a visit to India was told that the cost was actually in the \$8 to \$12 range. If properly installed and used, TEDs are said to be up to 97% effective in permitting turtles to escape from shrimp trawl nets, while resulting in a negligible loss of shrimp catch. Discussion of the author with a member of the National Marine Fisheries Service (Nov. 1997). See also United States—Import Prohibition of Certain Shrimp and Shrimp Products, U.S. Panel Submission, para. 23. Thailand disagreed with the U.S. contention. See *id.*, Thailand's Second Panel Submission, paras. 5, 19–22.

<sup>2</sup> The relevant provisions of Article XX read:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

General Agreement on Tariffs and Trade [GATT], as amended, reprinted in GATT, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 486 (1994) [hereinafter GATT 1994].

<sup>3</sup> The leatherback, the green, the hawksbill and the olive ridley.

In its report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, the WTO Appellate Body upheld the dispute settlement panel's finding against the United States but disagreed with the panel's reasoning. In doing so, the Appellate Body significantly changed the WTO's approach to environmental regulations having an extrajurisdictional object. In each of the Appellate Body's three reversals of panel findings, it appeared to respond to charges that the WTO's dispute settlement process is trade-biased. First, the Appellate Body held that WTO rules do not prohibit a panel from accepting unsolicited amicus curiae briefs submitted by environmental nongovernmental organizations (NGOs). Second, it confirmed that the U.S. ban legitimately "relat[es] to the protection of exhaustible natural resources" for purposes of Article XX(g). Third, it criticized the panel for its "overly broad" depiction of the WTO Agreement's purpose and for its focus on a priori "categories" of measures, rather than on a factual analysis of how the United States had actually applied its particular import ban.<sup>4</sup>

In June 1987, pursuant to authority granted it under the Endangered Species Act, the National Marine Fisheries Service of the U.S. Department of Commerce first adopted regulations requiring shrimp trawlers of a certain size operating in the Gulf of Mexico either to use turtle-excluder devices or to restrict the time they tow shrimp nets without boarding their catch.<sup>5</sup>

On November 21, 1989, Congress enacted section 609 of U.S. Public Law 101-162, which instructed the President to initiate negotiations with foreign governments to develop bilateral and multilateral agreements for the protection of sea turtles, and to ban the import of shrimp and shrimp products "which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles."<sup>6</sup> The object of the legislation was twofold. First, as declared by its sponsors, it attempted to "level the playing field" between U.S. shrimpers, who were subject to the costs of complying with U.S. environmental regulations, and foreign shrimpers, who were not.<sup>7</sup> Second, for environmentalists, it would exert pressure on foreign governments to take stronger measures to protect endangered sea turtles.

Section 609(b) precludes shrimp imports unless "the President shall certify to Congress" that either (1) the "fishing environment of the harvesting nation does not pose a threat [to] . . . such sea turtles," or (2) the foreign government has adopted "a regulatory program governing the incidental taking of such sea turtles . . . that is comparable to that of the United States," and "the average rate of that incidental taking by the vessels of the harvesting nation is comparable" to that of U.S. vessels. The President delegated the authority to make the required certifications to the Department of State. The Department first interpreted section 609 to apply only to countries with coastlines bordering "the wider Caribbean and Western Atlantic region."<sup>8</sup> This limited application of the section was challenged by various environmental groups, as well as an association of U.S. shrimp trawlers, packers and suppliers. In December 1995, the U.S. Court of International Trade directed the Department "to prohibit not later than May 1, 1996 the

<sup>4</sup> WTO Doc. WT/DS58/AB/R, para. 116 (Oct. 12, 1998) [hereinafter AB Report].

<sup>5</sup> Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24,244 (1987). The regulations were opposed by many U.S. shrimpers, who nicknamed TEDs "trawler elimination devices." See Kathleen Doyle, *Turtle Excluder Device Regulations: Laws Sea Turtles Can Live With*, 21 N.C. CENT. L.J. 256, 271-82 (1995).

<sup>6</sup> Pub. L. No. 101-162, §609(b), 103 Stat. 1038 (1989).

<sup>7</sup> Section 609 was introduced and promoted by the senators from Louisiana in large part to help "our shrimpers in Louisiana." They argued that if the United States, notwithstanding their opposition, was going to impose these costs on their constituents, it was going to impose them on everyone else who wanted to compete in the U.S. market. See 135 CONG. REC. S12191 (1989).

<sup>8</sup> *Turtles and Shrimp Trawl Fishing Operations Protection: Guidelines*, 56 Fed. Reg. 1051 (1991). See also *Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 58 Fed. Reg. 9015 (1993).

importation of shrimp or products of shrimp *wherever* harvested in the wild with commercial fishing technology which may affect adversely [the designated] species of sea turtles."<sup>9</sup> The Department complied.

Eleven countries filed third-party submissions with the WTO dispute settlement panel hearing the complaints against section 609. All opposed the U.S. position. The submission of the European Communities was arguably the most significant. While the Communities asserted that the United States should lose in "the circumstances of this particular case," its position on unilateral extrajurisdictional measures was more flexible than in the earlier GATT *Tuna-Dolphin* cases.<sup>10</sup> The Communities now asserted that

Article XX may, in certain circumstances, be relied upon to justify measures taken to protect [the] global commons (globally shared environmental resources) or resources located outside the territory of a contracting party, provided, of course, that the other conditions of application of the relevant exception in Article XX, and the introductory clause thereof, are complied with.<sup>11</sup>

In effect, the two most powerful members of the WTO were calling for an "evolution" in GATT jurisprudence, one that the Appellate Body would soon provide.

Early signs suggested that the panel would seriously address the U.S. substantive environmental claims, and not limit its assessment to trade-related arguments. First, the panel agreed to form a group of conservation biology experts pursuant to Article 13.2 of the Dispute Settlement Understanding. The panel designated five individuals to form the expert group, two recommended by the United States and three by the complainants. Not surprisingly, while the experts all confirmed that the sea turtles were endangered, they did not concur on the most appropriate conservation method for the complainants to utilize and, in particular, on whether the means mandated by the United States regulation were necessary or appropriate.

Second, environmental nongovernmental organizations submitted two amicus briefs to the panel in support of the U.S. ban. A consortium of NGOs led by two U.S.-based groups filed one brief. The WWF-World Wildlife Fund for Nature filed the other. While the panel refused to accept the amicus briefs as independent documents, it accepted the factual portion of the consortium's brief as an exhibit to the United States' second written submission.

In its report of May 15, 1998, the panel held that the U.S. import ban violated GATT Article XI and was "not within the scope of measures permitted under the chapeau of Article XX."<sup>12</sup> It reasoned that the U.S. import restrictions on shrimp and shrimp products "were clearly a threat to the multilateral trading system."<sup>13</sup>

The Appellate Body first overruled the panel's holding that "accepting non-requested information from non-governmental sources is incompatible with the provisions of the

<sup>9</sup> *Earth Island Inst. v. Christopher*, 913 F.Supp. 559 (Ct. Int'l Trade 1995) (emphasis added). The Department of State then issued new guidelines, which, among other matters, permitted shrimp to be imported to the extent they were certified by a foreign government official to have been caught by TEDs, even if the foreign government in question did not have a "comparable regulatory program" mandating the use of TEDs. These guidelines were again challenged by the same groups and found by the U.S. Court of International Trade to be contrary to section 609.

<sup>10</sup> See *United States—Restrictions on Imports of Tuna*, 30 ILM 1594 (1991) (unadopted panel report, Aug. 16, 1991) [hereinafter *Tuna-Dolphin I*]; and *United States—Restrictions on Imports of Tuna*, 33 ILM 839 (1994) (unadopted panel report, June 16, 1994) [hereinafter *Tuna-Dolphin II*].

<sup>11</sup> Third Party Submission by the European Communities to the panel (on file with author). See also AB Report, paras. 65–74 (remarks by the Communities).

<sup>12</sup> *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R, para. 7.52 (May 15, 1998) [hereinafter *Panel Report*].

<sup>13</sup> *Id.*, para. 7.61. The panel repeated eight times that the U.S. environmental measures "undermine," "threaten" and "put at risk" the trading system. See *id.*, paras. 7.44, 7.45, 7.51, 7.55, 7.60, 7.61.

DSU."<sup>14</sup> The Appellate Body made this determination even though the language of Article 13 of the WTO Dispute Settlement Understanding refers to a panel's "right to seek information," and the panel clearly did not "seek" "non-requested" information. In the appeal, the Appellate Body not only accepted "for consideration" three NGO briefs attached as exhibits to the U.S. submission;<sup>15</sup> it also accepted a revised version of one of these briefs independently submitted by a group of NGOs.<sup>16</sup>

The Appellate Body next admonished the panel for having failed to examine whether the U.S. regulations were permissible under Article XX(g) as a "measure relating to the conservation of exhaustible natural resources."<sup>17</sup> The United States maintained that endangered sea turtles are clearly covered under Article XX(g), citing the earlier *United States—Reformulated Gasoline* case.<sup>18</sup> The complainants countered that the term "exhaustible natural resources" refers only to nonbiological resources, such as minerals. They also cited the two *Tuna-Dolphin* panel decisions, which had held that the U.S. tuna embargo was not "primarily aimed at the conservation of dolphins" because it attempted to coerce foreign countries into modifying their domestic regulations.<sup>19</sup>

The Appellate Body confirmed that the term "natural resources" incorporates the protection of living species, that there was a "sufficient nexus between the migratory and endangered marine populations involved and the United States,"<sup>20</sup> and that the U.S. measures thus fell within the scope of the Article XX(g) exception. The U.S. measures were thereby "provisionally" justified, subject to application of the chapeau of Article XX.<sup>21</sup> Though the Appellate Body limited its finding to the "specific circumstances of the case before us," it effectively rejected the reasoning of the *Tuna-Dolphin* panel decisions. Like the *Shrimp-Turtle* panel report, the *Tuna-Dolphin* cases had focused on a category of measures (import restrictions based on foreign production methods), as opposed to the particular characteristics of the import restriction in question.<sup>22</sup> The Appellate Body rejected this generic type of analysis. Curiously, it did so without ever citing the *Tuna-Dolphin* decisions.

<sup>14</sup> See AB Report, para. 110.

<sup>15</sup> The three briefs were submitted: (1) by the Earth Island Institute, the Humane Society, and the Sierra Club; (2) by the Center for International Environmental Law, the Center for Marine Conservation, the Environmental Foundation Ltd., the Mangrove Action Project, the Philippine Ecological Network, Red Nacional de Acción Ecológica, and Sobrevivencia; and (3) by the Worldwide Fund for Nature and the Foundation for International Environmental Law and Development.

<sup>16</sup> The Appellate Body did not, however, set any procedural guidelines for the submission of amicus briefs, an issue that remains open.

<sup>17</sup> While not addressing Article XX(g), the panel had observed that, even if the U.S. restrictions fell within the scope of paragraph (g), they were unjustifiable under the "chapeau" of Article XX.

<sup>18</sup> See WTO Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, 35 ILM 276, 299 (Jan. 29, 1996). The panel held that "clean air" was an exhaustible natural resource and that the U.S. measure thus fell within the scope of Article XX(g).

<sup>19</sup> The second *Tuna-Dolphin* panel held that the primary aim of the U.S. measures was "to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the conservation of dolphins." *Tuna-Dolphin II*, *supra* note 10, para. 5.24.

<sup>20</sup> AB Report, para. 133.

<sup>21</sup> See *id.*, para. 187(c). For reasons of judicial economy, the Appellate Body did not address whether the U.S. import ban was also "necessary to protect human, animal or plant life or health" under Article XX(b). *Id.*, para. 146.

<sup>22</sup> The *Shrimp-Turtle* panel used the same rationale under the chapeau of Article XX as applied by the *Tuna-Dolphin* panels under Article XX(g). All three panels held that the respective import embargoes were impermissible because they were "types" of measures that could "undermine" the trading system. The *Tuna-Dolphin II* panel claimed, "Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties." *Tuna-Dolphin II*, *supra* note 10, para. 5.26. The *Shrimp-Turtle* panel cited the *Tuna-Dolphin II* decision with approval. See Panel Report, *supra* note 12, para. 7.46.

In interpreting Article XX(g), an article "crafted more than 50 years ago," the Appellate Body focused less on the context of "the overall WTO Agreement" than on the contemporary context in which it must render its decision. Rather than analyze the original intent or drafting history of Article XX, the Appellate Body affirmed that the term "exhaustible natural resources" is "not 'static' in its content or reference but is rather 'by definition, evolutionary'." The Appellate Body held that the words "must be read . . . in the light of contemporary concerns of the community of nations about the protection and conservation of the environment." As evidence of the contemporary context, it emphasized the reference in the Preamble to the WTO Agreement to "the objective of sustainable development," a reference that did not appear in the original GATT. The Appellate Body stated that "it is too late in the day" to limit coverage under Article XX(g) to "the conservation of exhaustible mineral or other non-living resources," as the complainants desired. "In the absence up to now of any agreed amendments or modifications to the substantive provisions of the GATT 1994,"<sup>23</sup> the Appellate Body amended prior GATT analysis in light of contemporary perspectives.

The Appellate Body finally turned to the conditions set forth in the chapeau of Article XX, where it sought to maintain "a *balance* . . . between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members."<sup>24</sup> The Appellate Body defined its "task" as "the *delicate* one of locating and marking out a *line of equilibrium*" that "is not fixed and unchanging," but "moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."<sup>25</sup> In searching for this "equilibrium," the Appellate Body attempted to apply Article XX "delicately" to the United States' indelicate application of an import ban. It eschewed a generic analysis of import bans based on foreign production and processing methods, and concentrated on the "facts making up" the "specific case."<sup>26</sup>

The Appellate Body found six flaws in the application of section 609. First, and "[p]erhaps the most conspicuous flaw in this measure's application," the United States requires all "*exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same policy*" as that applied in the United States.<sup>27</sup> The report found that this has an unjustifiably "coercive effect" on policy decisions made by foreign governments. The Appellate Body admonished the United States for failing to take "into consideration different conditions which may occur in the territories of . . . other Members."<sup>28</sup> The United States was thus unable to assure that its policies were appropriate for the local "conditions prevailing" in these countries.

Second, the Appellate Body emphasized that, even where shrimp are caught using U.S.-prescribed methods, the United States still prohibits their importation if they come from countries that do not require the use of TEDs. The report suggested that the United States was "more concerned with effectively influencing WTO members to adopt" U.S.-prescribed regulatory regimes than assuring that shrimp actually imported into the country are caught with methods that do not endanger migratory sea turtles.<sup>29</sup>

Third, noting that the United States had successfully negotiated an Inter-American Convention for the Protection and Conservation of Sea Turtles, which demonstrates that

<sup>23</sup> AB Report, paras. 129–31, 155.

<sup>24</sup> *Id.*, para. 156 (emphasis of "balance" added).

<sup>25</sup> *Id.*, para. 159 (emphasis added).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, para. 161.

<sup>28</sup> *Id.*, para. 164.

<sup>29</sup> *Id.*, para. 165.

"multilateral procedures are available and feasible," the report found that the United States had never seriously attempted to negotiate a similar agreement with the four complainants.<sup>30</sup>

Fourth, the Appellate Body held that the United States had discriminated between WTO members by applying different "phase-in" periods during which they must require shrimp trawlers to use TEDs. Whereas countries in the Caribbean/western Atlantic region were permitted a three-year phase-in period, the rest of the world had been granted "only four months."<sup>31</sup>

Fifth, the report faulted the United States for having made far "greater efforts to transfer [TED] technology" to countries in the Caribbean/western Atlantic region "than to other exporting countries, including the appellees."<sup>32</sup>

Finally, the Appellate Body elaborated on the meaning of the reference in Article XX to "arbitrary discrimination." It effectively required the United States to create an administrative procedure pursuant to which foreign governments or traders would have an opportunity to comment on and challenge regulations before U.S. administrative bodies or courts. The Appellate Body held that the application of the U.S. measure is "arbitrary" in that the certification process is not "transparent" or "predictable," and does not provide any "formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it."<sup>33</sup> The report noted that the U.S. implementing agency issues "no formal written, reasoned decision, whether of acceptance or rejection," and that there is no "procedure for review of, or appeal from, a denial of an application."<sup>34</sup> The Appellate Body cited Article X of GATT 1994 as requiring the United States to grant foreign traders and countries these "due process" rights.<sup>35</sup> Without these procedures, foreign traders' only protection from arbitrary administrative action is through their government representatives before the WTO Dispute Settlement Body.

The Appellate Body did not criticize the U.S. Congress, directing its comments to the U.S. implementing agency, the Department of State, and perhaps, by implication, the Court of International Trade.<sup>36</sup> It noted that the actual statutory provisions of section 609 "appear[ ] to permit a degree of discretion or flexibility" that had been "effectively eliminated in [their] implementation . . . by the Department of State."<sup>37</sup> The Appellate Body implied that Congress, in using the term "comparable," would permit conservation measures that do not require the use of TEDs.

The United States has notified the Dispute Settlement Body that it will comply with the Appellate Body's ruling within thirteen months of its adoption by the DSB (i.e., by December 6, 1999).<sup>38</sup> The Department of State has already revised its guidelines to permit shrimp to be imported into the United States if they are caught by vessels using

<sup>30</sup> *Id.*, paras. 166-70.

<sup>31</sup> This was the result of a decision of the U.S. Court of International Trade, a body for which the United States "bears responsibility." *Id.*, para. 173.

<sup>32</sup> *Id.*, para. 175.

<sup>33</sup> *Id.*, para. 180.

<sup>34</sup> *Id.*

<sup>35</sup> AB Report, para. 182. Paragraph 3 of Article X, for example, requires parties to "administer in a uniform, impartial and reasonable manner" their laws and regulations, and to "maintain . . . judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action." GATT 1994, *supra* note 2.

<sup>36</sup> See *supra* note 9.

<sup>37</sup> AB Report, para. 161.

<sup>38</sup> See *Agriculture: EU Promises Decision on Hormone Dispute by May 13 WTO Implementation Deadline*, 16 Int'l Trade Ref. (BNA) 191 (Feb. 3, 1999).

TEDs, even if the foreign country does not require them.<sup>39</sup> During the implementation period, the Department will revise its guidelines, subject to U.S. administrative requirements under the Uruguay Round Agreements Act, to permit complainants to show that they use "comparable" methods to protect sea turtles from shrimp trawling, such as through limiting the time or area in which trawlers may operate.<sup>40</sup> Revised guidelines should offer foreign governments greater "due process" rights, including the right to challenge "preliminary" findings before they become definitive, in particular concerning the local "condition" of endangered sea turtles and the comparability of their shrimp-trawling requirements.<sup>41</sup> Finally, the United States will attempt to create a "paper trail" of its offer to negotiate a multilateral sea turtle protection convention and to provide the complainants with TED technology and consulting services. The Department is already attempting to find the funds to finance an international conference to negotiate a treaty.

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The WTO Appellate Body's decision can be viewed as a response to challenges to WTO legitimacy by powerful environmental constituencies in the United States and Europe that successfully pressured their governments into seeking changes in the application of GATT rules. Rather than uphold a bright-line rule against all trade restrictions based on foreign production methods, the Appellate Body has attempted to foster a process of taking foreign interests into account when domestic regulations addressing environmental issues affect international trade. In this respect, the decision departs significantly from earlier GATT jurisprudence, particularly the reasoning in the two *Tuna-Dolphin* cases of 1991 and 1994.

The Appellate Body's decision has nonetheless been criticized from different perspectives. Some trade law experts questioned whether it is appropriate for a WTO panel to review domestic legislative and administrative procedures.<sup>42</sup> Earth Island Institute, the NGO that, through U.S. courts, had compelled the United States to apply section 609 to all countries, dubbed the decision "a death blow for sea turtles."<sup>43</sup> The complainants, in contrast, called the Appellate Body's approach "dangerous," fearing that the ruling "will result in explosive growth in unilateral, discriminatory, trade-related environmental measures."<sup>44</sup>

Much has been made of the decision to admit NGO briefs. On the one hand, the acceptance of the briefs was largely symbolic. The Appellate Body focused "on the legal

<sup>39</sup> See 63 Fed. Reg. 46,094 (1998). This followed a successful government appeal of an earlier judgment by the Court of International Trade. See *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998). The U.S. court of appeals decision is discussed in 15 Int'l Trade Rep. (BNA) 1063 (June 17, 1998). The revised guidelines are again being challenged before the trade courts by the Earth Island Institute and other environmental organizations. The decision reported at 16 Int'l Trade Rep. (BNA) 638 (Apr. 14, 1999) is being appealed.

<sup>40</sup> Telephone interview with a representative of the U.S. Department of State (Feb. 8, 1999). On March 25, 1999, the Department of State published a Notice of Proposed Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 14,481 (1999) [hereinafter 1999 Proposed Guidelines]. The 1999 Proposed Guidelines were subject to public comment for a 30-day period (until April 24, 1999). Once finalized, the revised guidelines are to be submitted to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate, which may vote to indicate their agreement or disagreement with the revised text. Such a vote, however, is not binding on the Department of State. See Uruguay Round Agreements Act of 1994, 19 U.S.C. §3533(g) (1994).

<sup>41</sup> See 1999 Proposed Guidelines, *supra* note 40.

<sup>42</sup> Telephone interview, *supra* note 40.

<sup>43</sup> *WTO rejects U.S. ban on shrimp nets that harm sea turtles*, CNN, Oct. 12, 1998 (visited Feb. 8, 1999) (<http://www.cnn.com/US/9810/12/world.trade.ruling>).

<sup>44</sup> See *Complainants in WTO Shrimp Case Slam Appellate Report at DSB*, INSIDE U.S. TRADE, Nov. 13, 1998, at 7-8 (summarizing and citing comments of the complaining parties before the WTO Dispute Settlement Body).



arguments in the main U.S. appellant submission," and not on those in the NGO briefs.<sup>45</sup> On the other hand, a panel's acceptance of amicus briefs could also benefit business interests (and their legal representatives) seeking greater influence over the WTO litigation process by submitting their own factual and legal arguments to WTO panels.

The United States may have lost the legal case. Yet because the Appellate Body has recognized the potential legitimacy of unilateral measures, the developing country complainants may ultimately be prompted to upgrade their environmental regulations. The U.S. Department of State has taken the Appellate Body's decision into account in fashioning proposed revisions to its guidelines.<sup>46</sup> It has done so in such a manner that, as a practical matter, foreign shrimpers wishing to export to the U.S. market should still be forced to use TEDs. If the complainants seek WTO arbitration against the United States for failure to comply with the Appellate Body's decision, the controversial *Shrimp-Turtle* case will surface once more.

GREGORY SHAFFER

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*International Criminal Tribunal for the former Yugoslavia—command responsibility—multiple defendants—rape constituting torture as grave breach of 1949 Geneva Conventions and violation of laws or customs of war—characterization of conflict in Bosnia and Herzegovina*

PROSECUTOR V. DELALIĆ. No. IT-96-21-T.

International Criminal Tribunal for the former Yugoslavia, Nov. 16, 1998.

On November 16, 1998, a trial chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) issued its judgment in the *Čelebići* case against four defendants.<sup>1</sup> The chamber found the *de facto* commander of the Čelebići prison camp liable under the principle of command responsibility for various acts of torture and ill-treatment at the camp. It also found two other accused guilty of grave breaches of the Geneva Conventions and violations of the laws or customs of war for their actions at the camp. A fourth accused, indicted only under the principle of command responsibility, was found not guilty on all counts owing to the lack of a superior-subordinate relationship. Those accused convicted of multiple offenses were ordered to serve their sentences concurrently.

The indictment against the four accused, three Bosnian Muslims and one Bosnian Croat, alleged that in 1992 Bosnian Muslim and Croat forces took control of villages with predominantly Bosnian Serb populations in and around the Konjic municipality in central Bosnia and Herzegovina. The persons thereby detained were held in a prison camp in the village of Čelebići, where detainees were killed, tortured, sexually assaulted and subjected to cruel and inhuman treatment by the four accused. The accused, a camp guard (Esad Landžo), the camp commander (Zdravko Mucić), the camp deputy commander and later commander (Hazim Delić), and the coordinator of the Bosnian Muslim and Bosnian Croat forces in the area and later a commander in the Bosnian Army (Zejnil Delalić), were charged with offenses under international humanitarian law constituting grave breaches of the Geneva Conventions and violations of the laws or customs of war pursuant to Articles 2 and 3 of the ICTY's Statute.<sup>2</sup> Landžo and Delić were

<sup>1</sup> AB Report, para. 91.

<sup>2</sup> See 1999 Proposed Guidelines, *supra* note 40.

Prosecutor v. Delalić, Mucić, Delić & Landžo, Judgment, No. IT-96-21-T (Nov. 16, 1998) (Karibi-Whyte (presiding), Odio Benito & Jan, JJ.) [hereinafter Judgment].

<sup>3</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Statute, UN Doc. S/25704,

charged for the most part with individual criminal responsibility pursuant to Article 7(1) of the ICTY's Statute as direct participants in certain of the alleged crimes, including acts of murder, torture and rape.<sup>3</sup> Mucić and Delalić were primarily charged as superiors with responsibility, pursuant to Article 7(3) of the Statute, for crimes committed by their subordinates, including those alleged to have been committed by Landžo and Delić. Several counts also charged Delić in his capacity as a superior with command responsibility.

Regarding offenses charged as grave breaches of the Geneva Conventions, the trial chamber referred to the finding of the appeals chamber in its decision on jurisdiction in the *Tadić* case (jurisdiction decision) that, for Article 2 to be applicable, two requirements must be met: (1) the alleged acts must have been committed within the context of an international armed conflict; and (2) the alleged victims must have been "protected persons" under the relevant convention.<sup>4</sup> Addressing the first requirement, the trial chamber determined that the relevant question was whether an international armed conflict existed in Bosnia and Herzegovina in May 1992 and continued throughout the rest of the year when the alleged offenses occurred. In answering this question, the chamber examined the evidence that the Yugoslav People's Army (JNA) had strengthened its presence in Bosnia throughout the latter half of 1991 and 1992 and that it was openly involved in combat activities in Bosnia from the beginning of March into April and May 1992. The chamber found:

On the basis of this evidence alone, the Trial Chamber can conclude that an international armed conflict existed in Bosnia and Herzegovina at the date of its recognition as an independent State on 6 April 1992. There is no evidence that the hostilities which occurred in the Konjic municipality at that time were part of a separate armed conflict and, indeed, there is some evidence of the involvement of the JNA in the fighting there.<sup>5</sup>

The chamber went on to consider whether the nature of the conflict had changed with the withdrawal of the JNA. Distinguishing the situation in the *Nicaragua* case,<sup>6</sup> the chamber concluded that the breakdown of previous state boundaries and the creation of new ones characterized the situation with which it was concerned. Thus, the question before it was "one of continuity of control of particular forces,"<sup>7</sup> the crucial date being May 19, 1992, when the JNA apparently withdrew from Bosnia. Importantly, the chamber noted the relevance of the fact that the forces constituting the VRS (Army of the Serbian Republic of Bosnia and Herzegovina) had a "prior identity as an actual organ of the SFRY [Socialist Federal Republic of Yugoslavia]: the JNA." It determined that even though the FRY (Federal Republic of Yugoslavia (Serbia and Montenegro)) took control of this organ and severed the formal link between them by creating the VJ (Army of the FRY) and the VRS, the presumption remained that these forces retained their link with it, unless demonstrated otherwise.<sup>8</sup> Agreeing with Judge McDonald's dissent in the *Tadić*

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annex (1993), reprinted in 32 ILM 1192 (1993). The Statute was amended on May 13, 1998, by means of Security Council Resolution 1166 (1998).

<sup>3</sup> The allegations of rape were charged as torture or, in the alternative, cruel treatment.

<sup>4</sup> *Prosecutor v. Tadić, Appeal on Jurisdiction*, No. IT-94-1-AR72, paras. 81, 84 (Oct. 2, 1995). In dicta, the trial chamber noted the possibility, in support of Judge Abi-Saab's separate opinion in the jurisdiction decision, that customary law has developed to the point where the grave breach provisions of the Geneva Conventions could be applied to internal armed conflicts. Judgement, para. 202.

<sup>5</sup> Judgement, para. 214.

<sup>6</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 4 (June 27).

<sup>7</sup> Judgement, para. 231.

<sup>8</sup> *Id.*, para. 232.

case that "the creation of the VRS was a legal fiction,"<sup>9</sup> the chamber concluded that an international armed conflict existed in Bosnia at least from April 1992 and that this conflict continued for the most part unaltered throughout 1992.<sup>10</sup>

As for the second requirement enunciated by the appeals chamber in the *Tadić* jurisdiction decision, the chamber found that the victims were protected persons under the Fourth Geneva Convention.<sup>11</sup> In doing so, it found not only that the victims were civilians, but also that the Convention's requirement that the victims be "in the hands of a party to the conflict . . . of which they were not nationals"<sup>12</sup> had been met.<sup>13</sup> The chamber determined, given its finding on the character of the conflict and the continued influence of the JNA and FRY in the conflict after May 19, 1992, that the Bosnian Serbs could be regarded as "acting on behalf" of the FRY in its armed conflict against the Bosnian authorities.<sup>14</sup> As such, the Bosnian Serbs who were detained were regarded as having a different nationality from their captors and were thus "in the hands" of a party to the conflict of which they were not nationals.

After briefly examining Article 3 of the ICTY Statute and Article 7(1) concerning individual criminal responsibility,<sup>15</sup> the chamber turned to the legal parameters of the principle of command responsibility as enshrined in Article 7(3). In particular, it considered the "indirect" responsibility entailed by the failure of a commander to take action to prevent violations of international humanitarian law by his or her subordinates.<sup>16</sup>

In making its findings on "indirect" command responsibility, the chamber noted that three elements are required for its application: (1) the accused was involved in a superior-subordinate relationship; (2) the superior knew or had reason to know that the criminal act was about to be committed; and (3) the superior had failed to take necessary and reasonable measures to prevent the criminal act or punish its perpetrator.<sup>17</sup>

The chamber emphasized that indirect command responsibility applies to civilians holding positions of authority as well as military commanders, and to those in *de facto* as well as *de jure* superior positions.<sup>18</sup> Regarding the latter point, it explained that, for the principle of command responsibility to apply, the superior must have "effective control" over the individuals committing the underlying criminal acts "in the sense of having the material ability to prevent and punish the commission of these offences."<sup>19</sup> As for the second element noted above, the chamber found that, under customary international law as it existed when the offenses occurred, the necessary *mens rea* exists when the superior (1) had actual knowledge, established through direct or circumstantial evidence, that his subordinates were about to commit or had committed a crime, or (2) possessed information that at the least would put him on notice of the risk of such

<sup>9</sup> *Id.*, para. 233 (quoting Prosecutor v. Tadić, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, para. 7, No. IT-94-I-T (May 7, 1997)).

<sup>10</sup> *Id.*, para. 234.

<sup>11</sup> *Id.*, para. 271. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12 1949, 6 UST 3516, 75 UNTS 287 [hereinafter Convention IV].

<sup>12</sup> Convention IV, *supra* note 11, Art. 4.

<sup>13</sup> Judgement, para. 265.

<sup>14</sup> *Id.*, para. 262.

<sup>15</sup> Regarding these subjects, the trial chamber referred to earlier Tribunal jurisprudence, namely the jurisdiction decision and the Opinion and Judgement in the *Tadić* case, note 34 *infra*, respectively.

<sup>16</sup> According to the trial chamber, the other form of command responsibility ("direct" command responsibility), where the commander takes positive acts in furtherance of the violation, is subject to the general principles of accomplice liability under Article 7(1) of the ICTY Statute. See Judgement, para. 334.

<sup>17</sup> *Id.*, para. 346.

<sup>18</sup> *Id.*, para. 354.

<sup>19</sup> *Id.*, para. 378.

offenses by indicating the need for additional investigation to determine whether crimes had been or were about to be committed.<sup>20</sup>

Applying these criteria, the chamber deemed only Mucić, the camp commander, to have had the authority to prevent violations of international humanitarian law in the camp.<sup>21</sup> He was found criminally responsible for having failed to make any serious effort to prevent the violations or to punish his subordinates for those crimes. The chamber held that the criteria were not satisfied with respect to the remaining two defendants charged with command responsibility. Delalić, although a commander, was found not to have had command authority over the camp, its commander, its deputy commander or the guards.<sup>22</sup> Accordingly, the required superior-subordinate relationship was absent and he could not be held responsible for the crimes committed at the camp. With respect to the third defendant, Delić, it was not established that he was within the chain of command at the camp with the power to issue orders to subordinates or to prevent or punish criminal acts of subordinates.<sup>23</sup> Thus, although the guards often did what he suggested, he was not a superior for the purposes of the imputation of criminal liability.

The chamber then considered the elements of the charged offenses under customary international law. In doing so, it noted that there is no substantive difference between the crimes of murder and willful killing,<sup>24</sup> and that the required intent for these crimes is the intention of the accused to kill, inflict serious injury or act with reckless disregard of human life.<sup>25</sup>

Regarding torture, the chamber found that the definition in the Torture Convention constituted customary international law and that torture "entails acts or omissions, by or at the instigation of, or with the consent or acquiescence of an official, which are committed for a particular prohibited purpose and cause a severe level of mental or physical pain or suffering."<sup>26</sup> The crime of willfully causing great suffering or serious injury to body or health, according to the chamber, is distinguished from torture primarily by the fact that the alleged acts or omissions need not be committed for a prohibited purpose.<sup>27</sup> Inhuman treatment was found to involve acts or omissions that cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.<sup>28</sup> The chamber also noted that there is no difference with respect to torture between the grave breach regime and common Article 3 of the Geneva Conventions, and that the offense of cruel treatment under common Article 3 has the same meaning as inhuman treatment in the grave breach provisions.<sup>29</sup> The chamber also concluded that there is a clear prohibition on rape and sexual assault under international humanitarian law.<sup>30</sup> It defined rape as constituting "a physical invasion of a sexual nature, committed on a person under circumstances that are coercive,"<sup>31</sup> and held that whenever rape and other forms of sexual violence fulfill the criteria of torture, they constitute torture.<sup>32</sup>

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<sup>20</sup> *Id.*, para. 383; *see also* para. 393.

<sup>21</sup> *Id.*, para. 775.

<sup>22</sup> *Id.*, para. 721.

<sup>23</sup> *Id.*, para. 810.

<sup>24</sup> *Id.*, para. 422.

<sup>25</sup> *Id.*, para. 439.

<sup>26</sup> *Id.*, para. 442.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Judgement, para. 443.

<sup>30</sup> *Id.*, para. 477.

<sup>31</sup> *Id.*, para. 479.

<sup>32</sup> *Id.*, para. 495.

The notable findings in this case concern (1) the applicability of Article 2 of the Statute to the conflict in Bosnia, (2) command responsibility, and (3) sexual assault. Moreover, in addition to being the first trial of multiple defendants, this was the first trial of non-Serbs by the ICTY.<sup>33</sup> Discussing the role of non-Serb forces in the violation of international humanitarian law and holding certain individuals accountable for specific offenses enhance the perceived neutrality of ICTY and undermine unjustified charges of organizational bias.

With respect to Article 2 of the Statute, the majority in the *Tadić* case,<sup>34</sup> in the context of its finding that the victims were not protected persons under the Geneva Conventions, found the conflict not to be international. It did so because it determined that it could not conclude that the VJ had "effective control" over the VRS, as required under the *Nicaragua* standard. In the instant case, agreeing with the dissent in *Tadić*,<sup>35</sup> the trial chamber found that the conflict in Bosnia and Herzegovina in 1992 was international in character in light of the un rebutted presumption that the VJ and the VRS had remained linked, and it concluded that the creation of the VRS was a "legal fiction."

It could be considered ironic that in a case against Bosnian Muslims and a Bosnian Croat the conflict was found to be international, but that in the only other case to consider this issue, against a Bosnian Serb, it was found to be internal. Specifically, in finding that the detainees were "protected persons" under the Fourth Geneva Convention, the trial chamber rejected the hypothesis of the appeals chamber in the *Tadić* jurisdiction decision that a finding that detainees in the hands of the Bosnian Serbs were constructively in the hands of the FRY (a party to the conflict of which they are not nationals) would result in the "absurd" situation that Bosnian Serb civilians in the hands of Bosnian government forces would be unprotected by the Geneva Conventions, while Bosnian Muslim and Croat civilians in the hands of Bosnian Serb forces would be protected. According to the chamber, Bosnian Serb civilians need not necessarily be viewed as Bosnian nationals for the purpose of applying the grave breach provisions.

The chamber's decision to interpret the applicability requirements of the Fourth Geneva Convention flexibly and in accordance with developments in human rights doctrine could be viewed as an advance in the protection offered to civilians in times of armed conflict when compared with the more restrictive approach taken by the *Tadić* majority and, to a certain extent, anticipated by the appeals chamber majority in its jurisdiction decision. Nevertheless, in light of the varying determinations on the character of the conflict, the relevant standard to be used in making this determination is ripe for appellate adjudication.

With regard to the principle of command responsibility, this is the first decision by an international court since the trials resulting from the Second World War to apply the principle. The decision reaffirmed its position in customary international law.<sup>36</sup> Its conclusion that civilian as well as military superiors and that *de jure* as well as *de facto* positions of command entail such responsibility builds on previous jurisprudence. Nevertheless, apart from its rejection of the prosecutor's assertion that knowledge of violations could be presumed, the chamber's findings could be characterized as quite broad. Even its finding regarding knowledge is broader than it appears at first. In applying it to

<sup>33</sup> The only other trial completed before this judgment was of Duško Tadić, a Bosnian Serb. Dražen Erdemović, a Bosnian Croat who fought with the Bosnian Serb forces in Bosnia, pleaded guilty and thus was not brought to trial, although a sentencing judgment was rendered. See Olivia Swaak-Goldman, Case note, *Prosecutor v. Erdemović*, 92 AJIL 284 (1998).

<sup>34</sup> *Prosecutor v. Tadić*, Opinion and Judgement, No. IT-94-1-T (May 7, 1997).

<sup>35</sup> See *supra* note 9.

<sup>36</sup> The issue was raised in the *Akayesu* judgment of the Rwanda Tribunal, at para. 691, but the trial chamber found that it could not consider it. *Prosecutor v. Akayesu*, Judgement, No. ICTR-96-4-T (Sept. 2, 1998).

the facts, the chamber ruled that by removing himself from the premises, the camp commander had willfully sought to avoid knowledge.<sup>37</sup> The judgment, in enunciating the parameters of the principle, including the essential elements, will be of great value to other courts, both international and municipal, charged with addressing this issue.

As for sexual assault, the definition of rape used in the present case comports with that in the *Akayesu* opinion<sup>38</sup> of the International Criminal Tribunal for Rwanda (ICTR) in considering the issue of rape as a crime against humanity. The consistency of these definitions helps to provide some clarity in this area, although a ruling by the appeals chamber would be welcome.<sup>39</sup> Importantly, the present case confirms for the first time that rape constitutes torture as a grave breach of the Geneva Conventions and a violation of the laws or customs of war under Articles 2 and 3 of the ICTY's Statute and is the first conviction by the ICTY for these crimes.<sup>40</sup> Add to this the finding of the ICTR that rape and sexual violence can constitute crimes against humanity, and the protection offered victims of sexual assault in conflict situations is solidified. This is especially the case when one considers that oral rape is included in these findings, as a crime against humanity by the ICTR in *Akayesu*,<sup>41</sup> and as torture by this trial chamber (in dicta because the offense was not so charged).<sup>42</sup> The subsequent decision by an ICTY trial chamber in the *Furundžija* case confirmed that oral penetration constitutes rape in violation of the laws or customs of war.<sup>43</sup> Genocide remains the only substantive provision in the Statutes of the ICTY and the ICTR not yet addressed in relation to sexual violence.

OLIVIA SWAAK-GOLDMAN

*Iran—United States Claims Tribunal*

*Self-determination—Canada—Quebec—right to secede under constitutional law and public international law—role of international law in Canadian courts*

RE REFERENCE BY GOVERNOR IN COUNCIL CONCERNING CERTAIN QUESTIONS RELATING TO SECESSION OF QUEBEC FROM CANADA. 161 D.L.R. (4th) 385.  
Supreme Court of Canada, August 20, 1998.

In an attempt to clarify the legal context in which continuing Canadian constitutional conundrums arise, the federal executive referred three questions to the Supreme Court of Canada regarding the legality under both Canadian constitutional law and interna-

<sup>37</sup> As noted by one scholar, the definition of command responsibility contained in the ICTY's Statute "casts the net very widely by imposing criminal liability for conduct directly attributable to serious negligence in the supervision of subordinates." Mark J. Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Laws of War*, 86 CAL. L. REV. 939, 1040 (1998); see generally L. C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319 (1995).

<sup>38</sup> Prosecutor v. Akayesu, *supra* note 36, paras. 597–98.

<sup>39</sup> The judgment in the *Furundžija* case, issued three weeks after the Čelebići judgment by a different trial chamber of the ICTY, did not simply adopt the definition used by the *Akayesu* and Čelebići trial chambers but, instead, examined national legislation to arrive at a general principle of law. Although more technical, the definition arrived at by the *Furundžija* trial chamber is not inconsistent with that used in the Čelebići and *Akayesu* judgments. See Prosecutor v. Furundžija, Judgement, No. IT-95-17/1-T, paras. 176–86 (Dec. 10, 1998).

<sup>40</sup> The trial chamber in *Akayesu* stated that rape constitutes torture when certain conditions are met, but this was in dicta, as the chamber was considering rape as a crime against humanity under the ICTR's Statute. *Akayesu*, *supra* note 36, paras. 597, 688. Additionally, both the Inter-American Commission on Human Rights and the European Court of Human Rights have confirmed that rape can constitute torture, but not within the context of the Geneva Conventions and the laws or customs of war. See *Mejia v. Peru*, No. 10,970, 1996 INTER-AM. C.H.R., ANN. REP.; *Aydin v. Turkey*, 25 EUR. HUM. RTS. REP. 251 (1998) (Eur. Ct. H.R. 1997).

<sup>41</sup> The chamber held that variations of rape include, inter alia, the use of bodily orifices not intrinsically sexual. It also considers sexual violence as *any act of a sexual nature* committed on a person under coercive circumstances. *Id.*, paras. 596, 688.

<sup>42</sup> Instead, forcing a father and son to commit fellatio on each other was charged as inhuman treatment under Article 2 of the ICTY's Statute and cruel treatment under Article 3. Judgement, paras. 1060, 1066.

<sup>43</sup> *Furundžija*, *supra* note 39, para. 183.

tional law of a potential unilateral declaration of independence by the Province of Quebec. The Court declared that unilateral secession is not permitted under either Canadian constitutional law or international law. The "underlying principles that animate" the Canadian Constitution preclude secession,<sup>1</sup> even though there is no specific text prohibiting the dismantling of the Canadian state. However, if Quebecers were to vote yes to secession by "a clear majority on a clear question,"<sup>2</sup> democratic legitimacy would be conferred on the secessionist project and a constitutional obligation to negotiate would arise binding the other provinces and the federal authority. Although the analysis of international law issues in the opinion is far from exhaustive, the Supreme Court concluded that international law recognizes no right of a political subunit to secede as long as the government of the state "represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination" and the state "respects the principles of self-determination in its own internal arrangements."<sup>3</sup> The protection of territorial integrity is fundamental to international law and can be displaced only if the requisite conditions are met, which the Court held not to be the case for Quebec.

In October 1995, Canada experienced the trauma of an uncomfortably close sovereignty referendum in Quebec. Whereas the previous referendum, fifteen years earlier, had resulted in a solid federalist majority, the 1995 referendum was won by federalist forces by just over 1 percent of the popular vote. The national Government had been caught off guard, promises of constitutional change were trotted out at the last minute by a seemingly bewildered Prime Minister, and recriminations began. After very nearly losing the country through inattention, the federal Government devised a more aggressive strategy to confront nationalist sentiment in Quebec. As part of the strategy, a so-called Plan B was articulated,<sup>4</sup> which included systematically rebutting sovereigntist<sup>5</sup> claims, openly discussing the potential for difficult negotiations in the event of a yes vote in a future referendum, calling into question the legitimacy of plebiscites on the future of Canada limited to the voters of Quebec, and raising the specter of territorial division (the partition of Quebec) if a Quebec government attempted to leave the confederation.

A key element of Plan B was clarification of the legal position of Quebec should it seek to declare independence. For generations, the legal issues associated with sovereigntist claims had been ignored or suppressed. Quebec secessionists were ceded the moral high ground in arguing that Quebec's future inside or outside Canada was a purely political question that would be decided as an exercise of democratic choice solely by the people of Quebec.<sup>6</sup> Now, in 1997, the federal Government wanted to reassert the relevance of law to the shaping of democratic governance within Canada.<sup>7</sup> Less charitably, the Government may also have hoped that Quebecers might be frightened by a judicial declaration that secession by the province would be an "illegal" act. Most French-

<sup>1</sup> [1998] 161 D.L.R. (4th) 385, 446 [hereinafter Secession Reference].

<sup>2</sup> *Id.* at 448.

<sup>3</sup> *Id.* at 439.

<sup>4</sup> "Plan A" involved continued, but low-key, constitutional negotiations, addressing specific grievances through political accommodation and generally promoting the benefits of federalism in a soft manner.

<sup>5</sup> "Sovereigntist" is the term used in Canada in this context.

<sup>6</sup> See the comments of then-Premier Jacques Parizeau in 1996: "Quebeckers want to vote, they have a right to vote, they will vote. We cannot submit Quebeckers' right to vote to a decision by the court. It would be contrary to our whole democratic system." *Lawyer wins first round in bid to block referendum*, GAZETTE [Montreal], Sept. 1, 1995, at A11 (quoting Jacques Parizeau).

<sup>7</sup> See Robert Howse & Alisa Malkin, *Canadians Are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession*, 76 CAN. BAR REV. 186 (1997) (arguing that in liberal democracies legality is properly related to political legitimacy, that the rule of law underpins, and does not negate, rights of democratic participation).

speaking Quebecers may harbor nationalist sentiments, but there is little evidence of a widespread predisposition toward revolutionary acts.<sup>8</sup>

Against this political background, the federal executive referred three questions directly to the Supreme Court of Canada. The first asked the Court: "Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?"<sup>9</sup> The second reference question is the central one for present purposes:

Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?<sup>10</sup>

The third question asked the Court whether Canadian constitutional law or international law would have priority in case of conflict. Although the issue is important and unresolved in Canada, given the Supreme Court's completely compatible answers to questions 1 and 2, the Court declined to answer the third question.

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Not surprisingly, given its status as a national court with final appellate constitutional jurisdiction, the Supreme Court devoted most of its discussion to Canadian constitutional law.<sup>11</sup> By applying fundamental constitutional organizing principles, specifically "federalism," "democracy," constitutionalism and the "rule of law," and "respect for minorities," the Court determined that Quebec cannot unilaterally effect secession. Any such attempt would be unconstitutional.<sup>12</sup> However, the Court, in a notable bow to Canadian traditions of compromise and loose federalism, went on to declare that, if sovereigntist forces were to receive support by "a clear majority on a clear question" in a future referendum, a constitutional duty to negotiate would arise.<sup>13</sup> As this duty emerges purely from a constitutional convention, it is probably not judicially enforceable, but it is binding.<sup>14</sup> Although the content of this obligation to negotiate is vague, it seems not to require acceptance of any specific terms or preconditions for negotiation.<sup>15</sup> The "duty" seems best read as a cautionary and pragmatic gloss on constitutional obligation: declaring the legal invalidity of a unilateral declaration of secession does not mean that such a declaration cannot or will not happen, so one had best imagine the consequences.

<sup>8</sup> The emergence of a violent revolutionary cadre in the late 1960s, the Front de Libération du Québec (FLQ), did not meet with massive public support, though it did generate considerable sympathy within the province's francophone cultural elite.

<sup>9</sup> Secession Reference at 394.

<sup>10</sup> *Id.* Although this question was phrased in two parts, the Supreme Court quite properly chose to answer the question as an integral whole.

<sup>11</sup> The reference jurisdiction of the Court is set out in the Supreme Court Act, R.S.C., ch. S-26, §53(1) (1985). Successive governments in Canada have invoked the reference jurisdiction in attempts to clarify thorny constitutional issues and to seek legitimacy for proposed courses of action. See, for relatively recent examples, *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (asking whether or not the federal Government could proceed to petition the UK Parliament to "patriate" the Canadian Constitution in the absence of consent from Quebec); *Re: A.G. Quebec and A.G. Canada*, [1982] 2 S.C.R. 793 (a reference from the sovereigntist government of Quebec on whether or not Quebec possessed a veto over fundamental constitution change); and *Re: Manitoba Language Rights*, [1985] 1 S.C.R. 721 (concerning the scope of constitutional guarantees of minority French-language rights in the Province of Manitoba).

<sup>12</sup> Secession Reference at 446.

<sup>13</sup> *Id.* at 448. The clarity required for each element remains undefined.

<sup>14</sup> *Id.* at 447.

<sup>15</sup> For a detailed analysis of the constitutional law aspects of the decisions, see Jean-François Gaudreault-DesBiens, *The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy, and Identity*, 4 VT. L. REV. (forthcoming 1999).



This relationship between the legally required and the politically possible, between *de jure* and *de facto* actions, leads us directly to the fulcrum of the Court's decision as to the legality under public international law of Quebec's potential secession. The Court seized upon a single, crucial word in the second reference question to limit its work immeasurably. The second question, unlike the first constitutional question, asked the Court whether or not under international law Quebec has "the right to effect" unilateral secession from Canada. The use of the word "right" allowed the Court to address secession purely prospectively, and to eliminate most arguments relating to the effect of stale recognition of *de facto* independence. So-called effectivity analysis was rendered pointless and a subtle and provocative opinion by Professor Thomas Franck that treated the potential legitimizing effects of recognition could safely be ignored.<sup>16</sup>

It was not inevitable that the Supreme Court would read the "right" to secede in such a narrow fashion. One could ask whether "according to prevailing normative criteria, a unilateral secession would attract the recognition of Quebec by the international community as a sovereign state."<sup>17</sup> My own sense is that the answer to this question is a resounding yes. Even if a Quebec claim to secession cannot be justified on any coherent theory of self-determination,<sup>18</sup> this would not preclude subsequent recognition. Despite attempts in Europe to promote a normative content to state recognition, relied upon by the Canadian Supreme Court,<sup>19</sup> practice contemporaneous with the European statement on recognition undercuts the normative claim and reinforces the traditional view that recognition is essentially a political act.<sup>20</sup> Thus, recognition, though political in content, could provide retroactive legitimacy to a unilateral declaration of independence by Quebec (especially if the declaration followed a free and fair referendum), bequeathing a gloss of "right." It was just this analysis that the Supreme Court rejected and yet, as Howse and Malkin so rightly assert, "recognition is in fact the most probable 'real world' context in which the international community will face the legal questions surrounding the justification for unilateral secession."<sup>21</sup>

<sup>16</sup> The Franck opinion was lodged with the Court by the amicus curiae appointed after the refusal of the Quebec government to participate in the proceedings. The amicus did not "represent" Quebec but was charged with presenting the case in support of a unilateral right to secede. See *Supplément au dossier[:]* *Rapports d'experts de l'amicus curiae, Secession Reference* (Can. Sup. Ct.) (No. 25506).

<sup>17</sup> Howse & Malkin, *supra* note 7, at 212. This analysis closely mirrors the opinion of Prof. Franck, *supra* note 16.

<sup>18</sup> See, e.g., ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL APPRAISAL* 253 (1995); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 185 (1991); Allen Buchanan, *Self-Determination and the Right to Secede*, 45 J. INT'L AFF. 347, 357 (1992); and Lawrence S. Eastwood, Jr., Note, *Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299, 342, 347 (1993).

<sup>19</sup> *Secession Reference* at 443.

<sup>20</sup> Karen Knop argued forcefully in 1992 that recognition practice—at least in Europe—was being subjected to normative-content requirements related to human rights, protection of minorities and support for democratic governance. See Karen Knop, *The "Righting" of Recognition: Recognition of States in Eastern Europe and the Soviet Union*, 1992 CAN. COUNCIL INT'L L., PROC. 36. But previous state practice and even the practice of European states after the European Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," Dec. 16, 1991, 31 ILM 1486 (1992), suggest that the statement was merely a blip in an otherwise consistent evolution of recognition from a constitutive practice to a declaratory practice based purely on political, and interest-driven, criteria. For prior recognition practice, see Eastwood, *supra* note 18, at 312 (re Bangladesh); and MALCOLM SHAW, *TITLE TO TERRITORY IN AFRICA* 23 (1986) (re various African states). As to recent European practice, note that Germany recognized Slovenia and Croatia on December 23, 1991, and the European Community on January 15, 1992, despite considerable doubt (since borne out) that these new states fully subscribed to the supposed normative requirements of commitment to human rights, minority rights and democracy. See Eastwood, *supra*, at 325. Sir Hersch Lauterpacht got it right just after World War II: "recognition of States is not a matter governed by law but a question of policy." HERSCHE LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 1 (1947).

<sup>21</sup> Howse & Malkin, *supra* note 7, at 212. See also Eastwood, *supra* note 18, at 312–13, 321 (asserting *de facto* existence of Bangladesh and the Balkan Republics as the "cause" of international recognition).

Yet one cannot fairly criticize the Supreme Court of Canada for taking the easy way out. The Court was not asked to address the effect of *de facto* secession, but only to determine whether or not a right to secede exists under contemporary public international law, particularly as an element of the right to self-determination. Interpreting this "right" as a "prior right" is defensible.

My criticisms of the approach of the Court to international law are essentially methodological. First, I am troubled by its failure to articulate any clear conceptual framework for the relationship between international law and domestic law. Second, the Court's understanding of the sources of international law is impoverished; its complete failure to deal with custom and practice, when they are at the heart of recent doctrinal debates on the existence of a right to secede, is decidedly odd.

The written components of the Canadian Constitution are silent on the interplay between international and municipal law.<sup>22</sup> Canada lacks a magisterial judicial pronouncement comparable to Lord Denning's reasons in the *Trendtex* case<sup>23</sup> that would clarify the matter.<sup>24</sup> Although it is clear that treaty commitments must be "transformed" into Canadian law through an act of Parliament or a provincial legislature within their respective fields of legislative competence, such a transformation is often assumed.<sup>25</sup> In the only Supreme Court case<sup>26</sup> dealing directly with the relationship between customary international law and municipal law, readers were treated to five separate opinions, each directed to different issues. No clear *ratio decidendi* can be discerned. Canadians simply do not know whether or not customary international law forms part of the law of Canada.

Given this unsatisfying background, one might have expected the Supreme Court to seize the opportunity presented by the *Secession Reference* to clarify the role played by public international law within the Canadian legal system. Instead, the Court made matters worse. The amicus curiae had asserted boldly, but without extensive argument, that the Canadian Supreme Court would not have jurisdiction to apply "pure" international law.<sup>27</sup> Unwisely, the Court implicitly adopted that view without discussion.<sup>28</sup> The Court seems to have suggested that customary law, at least, does not form part of the law of Canada; the Court cannot simply apply customary law as a matter of right. Instead, the Court expressly treated international law (including customary law, treaties ratified by Canada, and declarations of intergovernmental organizations and assemblies) merely as a "consideration."<sup>29</sup>

The Court's treatment of persuasive authority in international law leaves much to be desired. All texts are treated as having essentially equal weight, from the Declaration on

<sup>22</sup> The Canadian Constitution is an amalgam of written texts and constitutional conventions, some inherited from the UK constitution, some of indigenous origin. See *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

<sup>23</sup> *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.).

<sup>24</sup> See, e.g., Ronald St. John Macdonald, *The Relationship between International Law and Domestic Law in Canada*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 88 (Ronald St. John Macdonald, Gerald L. Morris & Douglas M. Johnston eds., 1974).

<sup>25</sup> Unfortunately, courts have reached contradictory conclusions on how to interpret treaty commitments when treaties have not been expressly transformed into Canadian law. This is especially true for human rights treaty obligations. See, e.g., *Longner v. M.E.*, (1995) 184 Nat'l Rep. 230 (Fed. C.A.) (untransformed treaties are irrelevant to the interpretation of a domestic statute); *Regina v. Dolejs*, (1989) 100 A.R. 26 (C.A.) (unincorporated treaties may support the interpretation of a domestic statute); *International Fund for Animal Welfare Inc. v. Canada*, (1987) 45 Can. Crim. Cas. (3d) 457 (domestic law should be interpreted, as far as possible, to conform with unincorporated treaties). For greater detail, see Stephen Toope, *Canada and International Law*, 1998 CAN. COUNCIL INT'L L., PROC. (forthcoming).

<sup>26</sup> *Foreign Legations Case*, [1943] S.C.R. 208.

<sup>27</sup> See *Secession Reference* at 433.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Friendly Relations<sup>30</sup> to the Helsinki Final Act<sup>31</sup> to the United Nations Charter. More surprising still, only explicit texts are treated as relevant to the determination of international law. Custom and practice are simply not mentioned.

Relying solely on a reading of key treaty provisions addressing the right to self-determination of peoples,<sup>32</sup> and the gloss of various final declarations of intergovernmental conferences<sup>33</sup> and resolutions of the United Nations General Assembly,<sup>34</sup> the Court concluded with a deceptively simple statement of the law governing secession:

In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed . . . ; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. . . . Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions.<sup>35</sup>

If indeed these three circumstances are the only conditions under which "external self-determination" (secession) might legally arise, then the conclusion that Quebec does not qualify is incontrovertible. But it behooved the Court, for the sake of both rigor and completeness, to address arguments on emerging customary norms governing secession.

My point is not that a broad customary norm allowing unilateral secession now exists; that proposition is dubious at best. However, for the last decade, specifically since the demise of communism in most of Eastern Europe and the former Soviet Union, authoritative commentators have been arguing that state practice may have begun to recognize a more expansive right to secede than had previously been admitted. Various novel justifications for secession have been advanced, including traditional territorial claims linked to historical grievances,<sup>36</sup> the practice of discriminatory economic redistribution,<sup>37</sup> the need to protect distinct cultures,<sup>38</sup> a compelling duty to protect human rights,<sup>39</sup> and the existence within a given territory of "proto-states."<sup>40</sup>

These justifications have been linked to state practice that arguably undercuts the traditional limitation of external self-determination to colonial contexts,<sup>41</sup> and resuscitates, for good or ill, the more expansive Wilsonian ideal of self-determination: "No people must be forced under sovereignty under which it does not wish to live."<sup>42</sup> In

<sup>30</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 23, at 121, UN Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations].

<sup>31</sup> Conference on Security and Co-operation in Europe, Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975), reprinted in 14 ILM 1292 (1975) [hereinafter Helsinki Final Act].

<sup>32</sup> In UN CHARTER Arts. 1(2), 55; International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 1, 999 UNTS 171; and International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, Art. 1, 993 UNTS 3.

<sup>33</sup> Helsinki Final Act, *supra* note 31; and World Conference on Human Rights, Vienna Declaration and Programme of Action, June 25, 1993, UN Doc. A/CONF.157/24, at 20 (1993), reprinted in 32 ILM 1661 (1993).

<sup>34</sup> Declaration on Friendly Relations, *supra* note 30; and Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, GA Res. 50/6 (Nov. 9, 1995).

<sup>35</sup> Secession Reference at 442.

<sup>36</sup> See Brilmayer, *supra* note 18, *passim*.

<sup>37</sup> See ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (1991); and Buchanan, *supra* note 18, *passim*.

<sup>38</sup> See Buchanan, *supra* note 18.

<sup>39</sup> See S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837 (1990).

<sup>40</sup> See Holly A. Osterland, Note, *National Self-Determination and Secession: The Slovak Model*, 25 CASE W. RES. J. INT'L L. 655 (1993).

<sup>41</sup> See, e.g., Deborah Z. Cass, *Re-thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 24-29 (1992).

<sup>42</sup> Message from President Wilson to Russia on the Occasion of the Visit of the American Mission (June 9, 1917), quoted in Eastwood, *supra* note 18, at 299.

support of a widening concept of self-determination that might allow for secession from an existing democratic state, various authors discuss the cases of Bangladesh,<sup>43</sup> the Baltic Republics,<sup>44</sup> Croatia and Slovenia,<sup>45</sup> Eritrea<sup>46</sup> and the Slovak Republic.<sup>47</sup>

Each of these cases is controversial, and every responsible commentator notes the importance of defining relatively precise limits to any "right" to secede,<sup>48</sup> but it would have been helpful if the Supreme Court of Canada had at least acknowledged these arguments under customary international law, and had staked out a position that might have proved authoritative. The Court's complete disregard for customary law betrays a profound misunderstanding of international law sources<sup>49</sup> and a weak grasp of the Court's potential to influence normative development. In adopting a narrow, essentially positivist, reading of international law, the Court failed to illuminate the right to self-determination. No recent judgment of the Canadian Supreme Court had as much potential to influence public international law as did the *Secession Reference*. Unfortunately, that opportunity was largely missed. Although the judgment of the Court on some of the most troubling and important questions of contemporary international law is arguably correct as far as it goes, the Court's approach to reading international law is unsophisticated. The Court settled for a restrictive analysis that effectively eliminated all of the interesting and hard questions.

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*Universal jurisdiction over crimes against humanity under French law—grave breaches of the Geneva Conventions of 1949—genocide—torture—human rights violations in Bosnia and Rwanda*

*IN RE JAVOR*. 1996 Bull. crim., No. 132, at 379.

French Cour de cassation, Criminal Chamber, March 26, 1996.

*IN RE MUNYESHYAKA*. 1998 Bull. crim., No. 2, at 3.

French Cour de cassation, Criminal Chamber, January 6, 1998.\*

In the *Javor* case, certain Bosnian victims of the policy of "ethnic cleansing" that took place in Bosnia and Herzegovina, who were refugees in France, tried to rely on the universal jurisdiction of the French courts in order to file a criminal complaint (*plainte avec constitution de partie civile*) with an investigating magistrate (*juge d'instruction*) against their Serb torturers. In their complaint, they emphasized the importance of universal jurisdiction in cases where the criminals are not sued in their own country:

<sup>43</sup> See Eastwood, *supra* note 18, at 310–13 (though admitting that the case of Bangladesh probably has "little precedential value" because subsequent recognition seemed to be based upon the *de facto* existence of the new state).

<sup>44</sup> See Cass, *supra* note 41, at 33, 34; and Eastwood, *supra* note 18, at 316–21.

<sup>45</sup> See Carsten Thomas Ebenroth & Matthew James Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT'L ECON. L. 753, 796–99 (1996); Howse & Malkin, *supra* note 7, at 223–24; and Eastwood, *supra* note 18, at 322–29.

<sup>46</sup> See Cass, *supra* note 41, at 35–36.

<sup>47</sup> Salvatore Massa, Comment, *Secession by Mutual Assent: A Comparative Analysis of the Dissolution of Czechoslovakia and the Separatist Movement in Canada*, 14 WIS. INT'L L.J. 183 (1997); Ebenroth & Kemner, *supra* note 45, at 816; Cass, *supra* note 41, at 35–36; and Osterland, *supra* note 40, *passim*.

<sup>48</sup> See, e.g., Buchanan, *supra* note 18, at 352, 357–58; and Eastwood, *supra* note 18, at 337–43.

<sup>49</sup> It is ironic that the Court took great pains to emphasize the importance of custom or convention in the constitutional context, but ignored custom in international law: "[T]he Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority." *Secession Reference* at 445–46.

\* Relevant documents regarding the cases discussed herein without reference to a publication are in the possession of the author, to whom they were transmitted by William Bourdon, the attorney who initiated these cases. Translations from the French are by the author.

The mechanism of universal jurisdiction assigns to the jurisdictional organs of States an international mission and permits the judgment of perpetrators of serious crimes, when the courts that normally have jurisdiction over the case are *powerless or complicit* and cannot fulfill their mission. . . . The plaintiffs rely on French justice and hope that the crimes committed against them will be established and that their perpetrators, whether superiors or executors, will be pursued and punished.<sup>1</sup>

Their hopes, however, were not fulfilled and the Serb perpetrators accused of ethnic cleansing were not tried in France.

The case was first decided by Judge Getti, juge d'instruction du Tribunal de grande instance (T.G.I.) of Paris. In support of their argument for universal jurisdiction, the victims invoked various international instruments: the Convention on the Non-Applicability of the Statute of Limitations to War Crimes and Crimes against Humanity of November 26, 1968;<sup>2</sup> the Convention for the Prevention and Punishment of the Crime of Genocide of December 9, 1948;<sup>3</sup> the Charter of the Military Tribunal at Nuremberg, annexed to the Agreement of London of August 8, 1945;<sup>4</sup> Resolution 3074 of the United Nations General Assembly of December 3, 1973, on Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity;<sup>5</sup> the New York Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984;<sup>6</sup> and finally, the four Geneva Conventions on the Protection of Victims of War of August 12, 1949.<sup>7</sup>

Judge Getti's order<sup>8</sup> rejected most of the bases proffered to establish the universal jurisdiction of French courts under French law, but accepted two of them. The 1968 Convention on the Non-Applicability of the Statute of Limitations was rejected as a possible basis for jurisdiction because France has never ratified it.<sup>9</sup> The Nuremberg Charter was disregarded as well, as it was deemed to concern only Nazi crimes, and especially Nazi crimes against humanity. General Assembly Resolution 3074 (XXIV) was deemed inapplicable because it has no binding force. The Genocide Convention was set aside because it provides for territorial jurisdiction and for an international tribunal but not for the universal jurisdiction of municipal courts.<sup>10</sup> Judge Getti added that there is no other international basis for universal jurisdiction, as the existing customary rules on crimes against humanity are not explicit enough on issues of jurisdiction.<sup>11</sup> The judge

<sup>1</sup> Complaint (emphasis added) (on file with author).

<sup>2</sup> 54 UNTS 73.

<sup>3</sup> 2 UNTS 277.

<sup>4</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat. 1541, 82 UNTS 279.

<sup>5</sup> UN GAOR, 28th Sess., Supp. No. 30, at 78, UN Doc. A/9030/Add.1 (1973).

<sup>6</sup> 1665 UNTS 85.

<sup>7</sup> 6 UST 3114, 75 UNTS 31 [No. I]; 6 UST 3217, 75 UNTS 85 [No. II]; 6 UST 3316, 75 UNTS 135 [No. III]; and 6 UST 3516, 75 UNTS 287 [No. IV].

<sup>8</sup> T.G.I. Paris, Order (*ordonnance*), May 6, 1994 (on file with author).

<sup>9</sup> In France a statute of limitations applies to war crimes, if not to crimes against humanity.

<sup>10</sup> Article VI of the Genocide Convention, *supra* note 3, provides:

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act has been committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

In its decision in the *Pinochet* case, the Spanish National Court concluded that Article VI did not preclude the exercise of universal jurisdiction over genocide expressly contemplated by Spanish legislation. *In re Pinochet*, Nov. 5, 1998 (No. 1/98, Nat'l Ct., Crim. Div.) (plen. sess.) (to be reported in the July issue of the *AJIL*).

<sup>11</sup> According to the judge, "si le requérant souligne justement l'existence des principes universels définissant le crime contre l'humanité comme un crime international, ces seuls principes ne sont pas suffisants pour fixer la compétence juridictionnelle des tribunaux français." Order, *supra* note 8, at 2.

did, however, accept the 1949 Geneva Conventions and the Torture Convention as authorizing the French courts to decide this case involving foreign plaintiffs for acts committed abroad by foreign defendants.

The court of appeals<sup>12</sup> and the Cour de cassation (Supreme Court)<sup>13</sup> confirmed that there was no jurisdiction where the judge had found none, but reversed his decision where he considered that a basis of jurisdiction did exist, the final result being that the Bosnian victims could not obtain justice from the French courts. In other words, the court of appeals, followed by the Cour de cassation, found that no universal jurisdiction obtained in French law to deal with these Bosnian cases.

The 1949 Geneva Conventions, although ratified by France, were deemed not to create a basis for the exercise of universal jurisdiction by French courts. The Cour de cassation found, on the one hand, that France had not enacted any specific legislation to incorporate the universal jurisdiction provided for by the Conventions into the French legal order and, on the other hand, that the Conventions could have no direct effect in the national legal system because "their provisions have too general a character to be able directly to create rules on extraterritorial jurisdiction in criminal matters."<sup>14</sup>

The Torture Convention had been incorporated into French law and was referred to in Article 689-2 of the French Code of Criminal Procedure. It could therefore provide a basis for universal jurisdiction, but only where the accused is found on French territory. The T.G.I.—Judge Getti—had tried to interpret this provision broadly, in a manner affording it some power even when the accused is not on French territory. Emphasizing that the accused must be identified and the charges against him ascertained before he is arrested in France or his extradition is requested from another state, the T.G.I. considered that all the *actes d'instruction*, that is, all the acts of preliminary inquiry, could be undertaken even without the presence of the accused on French territory. The court of appeals and the Cour de cassation rejected this analysis, and adopted a narrow interpretation of the scope of judicial powers implied by universal jurisdiction; they declared that no universal jurisdiction exists as long as the perpetrator is not on French territory, not even the jurisdiction to try to ascertain his whereabouts.

The first cases regarding atrocities in Rwanda were no more successful than the Bosnian complaints.<sup>15</sup> Then it became known that a Hutu priest who had actively participated in the genocide was in France, acting as a priest in a little village in the south of France:<sup>16</sup>

[The plaintiffs] contended that they had witnessed the fact that during the months of April and May 1994, M. Munyeshyaka, while exercising his functions as a priest at the Church *THE HOLY FAMILY* in KIGALI (Rwanda), had ill-treated Tutsi refugees, in depriving them of food and water, had surrendered them to the HUTU militia and had coerced women into having sexual intercourse with him in exchange for saving their lives.<sup>17</sup>

<sup>12</sup> CA Paris, Oct. 24, 1994 (on file with author).

<sup>13</sup> 1996 Bull. crim., No. 132, at 379 [hereinafter *Javor*]. See Jean-Pierre Dintilhac, *Chronique de jurisprudence* (Procédure pénale: Commentaire de l'arrêt de la Chambre criminelle du 26 mars 1996), 1996 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ [REV. SC. CRIM.] (n.s.) 684; *Chronique législative* (Crimes contre l'humanité), 1996 REV. SC. CRIM. (n.s.) 894.

<sup>14</sup> The French text reads: "Ces dispositions revêtent un caractère trop général pour créer directement des règles de compétence extraterritoriale en matière pénale." *Javor* at 381.

<sup>15</sup> See Complaint, Kalinda et al. (T.G.I. Paris filed July 4, 1994); Complaint, Depaquier et al. (filed July 19, 1994), T.G.I. Paris, Order, Feb. 23, 1995 (on file with author).

<sup>16</sup> See *L'affaire du prêtre rwandais ou la confusion de Ponce Pilate*, Commentaire No. 70, DROIT PÉNAL, May 1998, at 17, note Jacques-Henri Robert.

<sup>17</sup> Memorial in defense (Cass. crim., hearing Dec. 16, 1997) (on file with author).

A common complaint was then filed against Wenceslas Munyeshyaka, who was arrested. The T.G.I. of Privas declared that it had jurisdiction, but only concerning the acts of torture and cruel and inhuman treatment as defined by the Torture Convention.<sup>18</sup> The Court of Appeals of Nîmes reversed that decision<sup>19</sup> on the astonishing grounds that jurisdiction must be established only on the basis of the "highest," in other words the most serious, offense, which in this case was genocide. As there is no universal jurisdiction for genocide in France, the court of appeals declared that the French courts had no jurisdiction at all to deal with the events in Rwanda. Naturally, the Cour de cassation reversed such an unusual decision. The case is now being tried on the merits (apparently without alacrity). A new law was adopted on May 22, 1996,<sup>20</sup> to adapt French legislation to Security Council Resolution 955 creating the International Criminal Tribunal for Rwanda. Since the Tribunal's Statute and that law provide for universal jurisdiction for genocide, the court of appeals can now determine that the suspect is subject to trial in France for both torture and genocide because he was found on French territory.<sup>21</sup>

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These cases have aroused controversy among French lawyers. Some of them have indicated agreement with the decision rendered by the Cour de cassation in the Bosnian case. Others, like Professor Lombois<sup>22</sup> and myself,<sup>23</sup> have criticized the decision, insisting on the fact that the Court has ignored the importance of the existence of two different general articles on universal jurisdiction in the Code de procédure pénale: Articles 689 and 689-1.

The first article, Article 689, provides that "[t]he authors or accomplices of offenses committed outside the territory of the Republic can be sued in the French courts and judged by them . . . whenever an international convention grants jurisdiction to the French courts." This article contemplates self-executing conventions. It makes no reference to the presence of the suspect in France.

The second article, Article 689-1, provides that, according to the international conventions cited in the following articles (689-2 to 689-7), universal jurisdiction exists for the offenses enumerated in these conventions, if the suspect is found in France. This article applies to conventions that, according to their terms, are not self-executing. An example is Article 5 of the Torture Convention.<sup>24</sup>

<sup>18</sup> T.G.I. Privas, Order (*ordonnance*), Depaquier, Kalinda et al., Jan. 9, 1996 (on file with author).

<sup>19</sup> CA Nîmes, Mar. 20, 1996 (on file with author).

<sup>20</sup> Law No. 96-432 of May 22, 1996, Journal Officiel [J.O.], May 23, 1996, p. 7695. This law was adopted two days after the decision of the Court of Appeals of Nîmes of May 20, 1996, and therefore could not be applied by it.

<sup>21</sup> Because the new law is procedural, the court of appeals, to which the case was remanded by the Cour de cassation, can apply it immediately to crimes previously committed. The situation was different in the Bosnian cases, although after the decision of the court of appeals but before the decision of the Cour de cassation, a law, No. 95-1, was also adopted on January 2, 1995, J.O., Jan. 3, 1995, p. 71, in order to adapt French legislation to Security Council Resolution 827 creating the International Criminal Tribunal for the former Yugoslavia (ICTY). This law provided for universal jurisdiction regarding the crimes over which the ICTY had jurisdiction, in other words, genocide and other grave violations of humanitarian law. But the law also restricted universal jurisdiction to cases where the suspect was in France. Therefore, the absence of the suspects from French territory remained an obstacle to jurisdiction.

<sup>22</sup> Claude Lombois, *De la compassion territoriale*, REV. SC. CRIM., Apr.-June 1995, at 399, and especially at 401. See also Michel Massé, *Ex-Yougoslavie, Rwanda: Une compétence "virtuelle" des juridictions françaises?* 1997 REV. SC. CRIM. (n.s.) 893.

<sup>23</sup> Brigitte Stern, *La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda*, 40 GER. Y.B. INT'L L. 280, and especially at 288 (1997). See also Brigitte Stern, *A propos de la compétence universelle*, in LIBER AMICORUM MOHAMMED BEDJAOUÏ 735 (1999); Rafaële Maison, *Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes*, 6 EUR. J. INT'L L. 260 (1995).

<sup>24</sup> Article 5 provides in pertinent part: "Each State Party shall likewise take such measures as may be necessary to establish jurisdiction over such offenses in cases where the alleged offender is present in the territory under its jurisdiction" (emphasis added).

It seems to me that the highest Court could have relied on Article 689, and considered that the Geneva Conventions are precisely the type of convention referred to by this article, as they provide directly for universal jurisdiction.<sup>25</sup> But the Cour de cassation preferred to state that no universal jurisdiction was directly created by the Geneva Conventions and that Article 689 could therefore not be a basis of universal jurisdiction in the French legal order. Moreover, this decision implies that the French courts are not ready to accept that universal jurisdiction can be based on customary international law.

These cases illustrate the reluctance of the French courts to assert universal jurisdiction. This attitude is not a French exception, but is quite widespread. According to Kenneth Randall, "The universality principle remains underutilized in the struggle to eliminate the most heinous crimes of the modern world."<sup>26</sup> This explains why in France the cases brought against Pinochet did not rely on universal jurisdiction but on passive personality jurisdiction.<sup>27</sup>

Nevertheless, at least until the international criminal court becomes a reality, the international community is in need of more aggressive utilization of universal jurisdiction. This point was made long ago by the District Court of Jerusalem in the *Eichmann* case, addressing its jurisdiction over war crimes and crimes against humanity in the following terms:

These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring criminals to trial. The jurisdiction to try crimes under international law is *universal*.<sup>28</sup>

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*Denial of residence status to alien on grounds of genocide—application of Refugee Convention—duty to extradite under Genocide Convention—use of NGO reports and experts in municipal proceedings*

MUGESERA v. MINISTER OF CITIZENSHIP AND IMMIGRATION. Nos. M96-10465, M96-10466. Immigration and Refugee Board (Appeal Division) of Canada, November 6, 1998.

In its landmark ruling of September 2, 1998, in the *Akayesu* case, the International Criminal Tribunal for Rwanda (ICTR) reviews the background of genocide in that country, noting in particular the role that hate propaganda played in preparing the tens of thousands of "willing executioners" who participated in the crimes of April to July, 1994. According to the Rwanda Tribunal, the "most notorious" propaganda agent was "a certain Léon Mugesera," an extremist pamphleteer who gave a public speech in November 1992 calling for the extermination of the Tutsi.<sup>1</sup> Mugesera fled Rwanda in the weeks following the incident. With the help of a network of aid workers, academics and diplomats that he had nurtured over many years, he was able to flee to Canada and obtain permanent resident status there. Two months after the *Akayesu* decision, Canada's Immigration and

<sup>25</sup> Article 49 of Convention I, Article 50 of Convention II, Article 129 of Convention III, and Article 146 of Convention IV, *supra* note 7, provide in pertinent part: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts" (emphasis added).

<sup>26</sup> Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 791 (1988).

<sup>27</sup> The French cases against Pinochet will be reported in the July issue.

<sup>28</sup> Attorney-General v. Eichmann, 36 ILR 18, 26 (D.C. Jm. 1961).

<sup>1</sup> Prosecutor v. Akayesu, Judgement, No. ICTR-96-4-T, paras. 39, 88, & n.54 (Sept. 2, 1998) (<http://www.un.org/icttr>), summarized in 93 AJIL 195 (1999).



Refugee Board (Appeal Division) confirmed a ruling stripping Mugesera of his resident status and ordering his expulsion for lying at the time of his application.

Proceedings against Mugesera began in 1995, two years subsequent to his arrival in Canada and following a long campaign by members of Canada's Rwandan community. In his decision of July 11, 1996, after a one-year trial at first instance, sole adjudicator Pierre Turmel concluded that Mugesera had violated Article II(c) of the Convention for the Prevention and Punishment of the Crime of Genocide,<sup>2</sup> by committing direct and public incitement to genocide.<sup>3</sup> The three-person bench of the Appeal Division, in a *de novo* hearing, essentially confirmed the findings of adjudicator Turmel.

The history of genocide shows that those who incite the crime speak in euphemisms. The trial chamber of the ICTR, in *Akayesu*, stated that "the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience."<sup>4</sup> During the Rwandan genocide, the President of the interim government exhorted a crowd to "get to work." For Special Rapporteur René Degni-Ségui, in the Rwandan sense of the term, this meant using machetes and axes.<sup>5</sup> In its *Kambanda* decision, the ICTR cited the accused's use of the incendiary phrase: "you refuse to give your blood to your country and the dogs drink it for nothing."<sup>6</sup>

Most of the debate before both jurisdictions of the Immigration and Refugee Board concerned the interpretation of Mugesera's speech. Experts on the Kinyarwanda language were called on both sides so as to establish the meaning of certain terms. The Appeal Division concluded, as did the adjudicator at first instance, that Mugesera's speech constituted incitement to genocide.

Among the expert witnesses heard by the Appeal Division were Professor Alison Desforges, who had also testified before the ICTR in the *Akayesu* case, Belgian human rights lawyer Eric Gillet, and Bacre Waly Ndiaye, former special rapporteur of the Commission on Human Rights on summary executions and currently Director of the New York office of the High Commissioner for Human Rights. All three participated in the international early warning of genocide in Rwanda that had followed Mugesera's speech. Desforges and Gillet had chaired an international commission of inquiry, composed of four nongovernmental organizations, that visited Rwanda in January 1993 and found the country in a state of great agitation as a result of the speech.<sup>7</sup> Prompted by the NGO commission's report, Ndiaye visited Rwanda in April 1993 and endorsed its findings.<sup>8</sup> Ndiaye's report addressed the role of hate propaganda,<sup>9</sup> and warned specifically of genocide.<sup>10</sup>

<sup>2</sup> Dec. 9, 1948, 78 UNTS 277.

<sup>3</sup> Mugesera, Immigration & Refugee Bd., File No. QML-95-00171 (July 11, 1996) (Turmel, Arb.). For the French version of the decision, see 7 REVUE UNIVERSELLE DES DROITS DE L'HOMME 190 (1996).

<sup>4</sup> Prosecutor v. Akayesu, *supra* note 1, para. 496.

<sup>5</sup> Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Rwanda, UN Doc. E/CN.4/1995/71, para. 24, reprinted in UN Doc. A/50/709-S/1995/915, Annex II.

<sup>6</sup> Prosecutor v. Kambanda, Judgement and Sentence, No. ICTR-97-23-S (Sept. 4, 1998), reprinted in 37 ILM 1411, para. 39(x) (1998).

<sup>7</sup> INTERNATIONAL FEDERATION OF HUMAN RIGHTS, INTER-AFRICAN UNION OF HUMAN RIGHTS, AFRICA WATCH & INTERNATIONAL CENTRE FOR HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT, REPORT OF THE COMMISSION OF INQUIRY INTO HUMAN RIGHTS VIOLATIONS IN RWANDA SINCE OCTOBER 1, 1990, at 23-26 (1993); see also COLETTE BRAECKMAN, RWANDA, HISTOIRE D'UN GÉNOCIDE 138-39 (1994); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE, 1959-1994, at 171-72 (1995); FILIP REYNTJENS, L'AFRIQUE DES GRANDS LACS EN CRISE 119-20 (1994); AFRICA RIGHTS, RWANDA: DEATH, DESPAIR AND DEFIANCE 70-71 (1994).

<sup>8</sup> Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Rwanda, 8-17 April 1993, UN Doc. E/CN.4/1994/7/Add.1, para. 9.

<sup>9</sup> *Id.*, paras. 56-58.

<sup>10</sup> *Id.*, paras. 78-81.

The NGO commission's report figured prominently in the decision of the Immigration and Refugee Board at first instance. The Appeal Division's judgment addressed the methodology of the commission in great detail, noting that it was the first to qualify the crimes in Rwanda as genocide and finding that the report's conclusions were definitively confirmed by the tragic events of 1994.<sup>11</sup>

\* \* \* \*

The ruling constitutes an important contribution in that it establishes some applicable principles when unofficial, nonjudicial investigations of the sort conducted regularly by NGOs enter the courtroom. Such evidence is bound to become increasingly important with the growth of international prosecution because often it is the NGOs that have the best access to the evidence. Ultimately, this may pose some problems for the NGOs themselves, which may find these new requirements troublesome and restrictive. In the case of some bodies such as the International Committee of the Red Cross, the possibility that their personnel and documents may be summoned in evidence may be seen as a serious threat to their ability to intervene in sensitive situations.

Mugesera may still continue to fight his expulsion from Canada, because prior to obtaining permanent resident status he was also recognized as a Convention refugee. Even without resident status, he is entitled, as a refugee, to remain in Canada. The next step, then, is to strip him of his refugee status, as a member of an excluded class. Article 1(F)(a) of the Convention on the Status of Refugees<sup>12</sup> declares the instrument inapplicable to a person when "there are serious reasons for considering that . . . he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."<sup>13</sup> Proceedings have begun in this respect. The reasoning of both the adjudicator and the Appeal Division will undoubtedly expedite treatment of the second phase in the *Mugesera* case, in that they already establish a most compelling case that he belongs in the excluded class.

The findings of the Immigration and Refugee Board that Mugesera is responsible for direct and public incitement to commit genocide invite criminal prosecution, although the fact that the burden of proof before the immigration tribunal is only one of preponderance must be taken into account in assessing the chances of success. Canada's Criminal Code was amended in 1987 to allow exercise of universal jurisdiction for crimes against humanity, but the lack of success of the Justice Department in prosecuting Nazi war criminals has resulted in a policy decision to remove war criminals from Canada under the Immigration Act rather than prosecute them in Canada.<sup>14</sup>

In April 1996, Rwanda's Minister of Justice formally requested that Canada extradite Mugesera, following the issuance of an international arrest warrant by Charles Kamanzi, prosecutor at the Kigali Court of Appeal. States parties to the Convention for the Prevention and Punishment of the Crime of Genocide "undertake to prevent and to punish" acts of genocide (Art. I). The Convention indicates that offenders are to be tried by the courts of the territory where the crime took place, or by an international criminal

<sup>11</sup> The Appeal Division considered significant the fact that the NGO commission's work is discussed in the United Nations "Blue Book" on Rwanda, *THE UNITED NATIONS AND RWANDA 1993-1996*, UN Sales No. E.96.I.20 (1996).

<sup>12</sup> July 28, 1951, 189 UNTS 137.

<sup>13</sup> This language is incorporated without change in Canada's Immigration Act, R.S.C., ch. I-2, §2(1) and schedule (1985).

<sup>14</sup> See Irwin Cotler, Case note, *Regina v. Finta*, 90 AJIL 460, 475-76 (1996).

tribunal (Art. VI). The International Criminal Tribunal for Rwanda cannot hope to try Mugesera because its jurisdiction *ratione temporis* is limited to 1994, and the alleged acts took place in 1992.<sup>15</sup> According to the Genocide Convention, states parties are obliged to cooperate in extradition in accordance with their laws and treaties in force (Art. VII).<sup>16</sup> Arguably, then, by failing to extradite Mugesera to Rwanda, Canada is breaching its obligations under the Genocide Convention and might conceivably be subject to an application before the International Court of Justice pursuant to Article IX of the Convention.

The head of the Adjudication Division has already stated publicly that Canada does not expect to send Mugesera back to Rwanda.<sup>17</sup> Canadian authorities may be fearful that a decision to extradite him to Rwanda will result in protests and petitions to international human rights bodies, such as the Committee against Torture.<sup>18</sup> Apart from questions of public safety, the success of an international petition would hinge on proof of the quality of justice in Rwanda. Many hundreds of trials have now been held in Rwanda since the wheels of justice began turning again in 1997.<sup>19</sup> Rwandan justice was initially criticized by international nongovernmental organizations,<sup>20</sup> but as the trials progressed, observers such as the United Nations field mission seemed increasingly prepared to accept the efforts as honest and essentially fair.<sup>21</sup> The 1998 report of the special representative of the Commission on Human Rights, Michel Moussalli, urged that international assistance be provided in order "to speed up the genocide trials"; the report did not criticize the quality of justice being administered.<sup>22</sup> In other words, Rwandan justice is neither a paradigm of procedural fairness nor an international horror story. As with justice systems in many states, the truth lies somewhere in the middle, and those promoting the human rights agenda find themselves torn between encouraging the judicial struggle against impunity and condemning the failure to conform fully to all accepted requirements of due process. Presumably, were Mugesera to be extradited, Rwandan courts would be under intense scrutiny and would surely put their best foot forward. If Canada is concerned about the possibility of capital punishment, it could condition his extradition on an assurance from Rwanda that it will not be imposed.<sup>23</sup>

The *Mugesera* decision of November 6, 1998, by Canada's Immigration and Refugee Board constitutes a new chapter in the mushrooming jurisprudence of international repression of genocide and other violations of international humanitarian law. The case

<sup>15</sup> Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex, Art. I, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994).

<sup>16</sup> There is no extradition treaty in force between the two states, although Rwanda has asked that an instrument be negotiated. In any case, recent amendments to Canada's Extradition Act have eliminated the requirement of a treaty in such cases.

<sup>17</sup> *LA PRESSE* (Montreal), Jan. 17, 1996, at A6.

<sup>18</sup> Canada has already lost one such petition before the Committee, a case involving return to Pakistan. *Khan v. Canada*, 15 HUM. RTS. L.J. 426 (1995).

<sup>19</sup> See Carla J. Ferstman, *Rwanda's Domestic Trials for Genocide and Crimes against Humanity*, HUM. RTS. BRIEF, Fall 1997 at 1; Robert F. Van Lierop, *Rwanda Evaluation: Report and Recommendations*, 31 INT'L LAW. 887 (1997); William A. Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 8 CRIM. L.F. 523 (1997).

<sup>20</sup> AMNESTY INTERNATIONAL, RWANDA: FIRST DEFENDANTS FACED UNFAIR TRIALS (AI Index No. AFR/47/03/97, 1997); and GRAVE DOUBTS ABOUT THE FAIRNESS OF THE FIRST TRIALS (AI Index No. AFR/47/13/97, 1997).

<sup>21</sup> Human Rights field operation in Rwanda, Report of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/1998/61, paras. 9, 36-38.

<sup>22</sup> Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussalli, pursuant to resolution 1997/66, UN Doc. E/CN.4/1998/60, para. 40(g).

<sup>23</sup> At present, neither Canadian policy nor Canadian law prohibits extradition in cases where capital punishment may be imposed. See *Kindler v. Canada*, [1991] 2 S.C.R. 779. See also William A. Schabas, Case note, *Kindler v. Canada*, 87 AJIL 128 (1993).

may be unique in its focus on a crime that is particularly difficult to prosecute; namely, direct and public incitement to commit genocide. The Appeal Division's ruling, as well as the decision at first instance, shows the feasibility of adjudicating such crimes even in places far from where they were committed. With the aid of experts from nongovernmental organizations, the truth can be elicited and responsibility established. Yet the *Mugesera* case adds yet another question mark to the inconsistent and equivocal practice in the area of universal prosecution.<sup>24</sup> At present, Canada intends neither to judge Mugesera before its criminal courts nor to extradite him to Rwanda so that he can stand trial there. Absent a request from an enthusiastic Spanish prosecutor, Mugesera may well escape a criminal trial.

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<sup>24</sup> See Luc Reydam's, *Universal jurisdiction over atrocities in Rwanda: Theory and practice*, 1 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 18 (1996).

## CURRENT DEVELOPMENTS

### THE 1998 JUDICIAL ACTIVITY OF THE INTERNATIONAL COURT OF JUSTICE

This Note summarizes the judicial work of the International Court of Justice during 1998,<sup>1</sup> using the updated General List, pleadings filed, Orders and Judgments given, and hearings held at the Peace Palace in The Hague to describe the Court's current record.

#### THE WORK OF THE COURT

##### *General List*

During the calendar year 1998, the Court was seized of six new cases: five are contentious: *Vietna Convention on Consular Relations (Paraguay v. United States)*;<sup>2</sup> *Gabčíkovo-Nagymaros Project (Slovakia v. Hungary)*;<sup>3</sup> *Request for Interpretation of the Court's Judgment of June 11, 1998, in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Preliminary Objections) (Nigeria v. Cameroon)* (hereinafter *Request for Interpretation*);<sup>4</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*;<sup>5</sup> and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*.<sup>6</sup> The sixth is a request for an advisory opinion brought by the Economic and Social Council of the United Nations entitled *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (hereinafter *Difference Relating to Immunity*).<sup>7</sup>

In 1998 a total of fourteen cases appeared on the General List at any particular time. Besides the six new cases referred to, the contentious proceedings before the full Court were *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)* and *(Libya v. United States)* (hereinafter *Lockerbie cases*), *Oil Platforms (Iran v. United States)* (hereinafter *Oil Platforms case*), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)* (hereinafter *Genocide case*), *Fisheries Jurisdiction (Spain v. Canada)*, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, and *Kasikili/Sedudu Island (Botswana/Namibia)*. During 1998, no cases were pending before any chamber of the Court.

##### *Pleadings*

In 1998 pleadings were filed in the following instances. On April 23, Bosnia-Herzegovina filed its Reply in the *Genocide case*. On September 30, Qatar filed an interim report on disputed documents in *Maritime Delimitation and Territorial Questions between Qatar and*

<sup>1</sup> Most of the information contained in this Note is available from the ICJ's Web site <www.icj-cij.org>. For a summary of the jurisprudence and judicial activity of the ICJ during the period 1987–1996, see COMMENTARIES ON WORLD COURT DECISIONS (1987–1996) (Peter H. F. Bekker ed., 1998). The year 1997 is reported on in 92 AJIL 350 (1998).

<sup>2</sup> Application of Paraguay filed in the ICJ Registry on April 3. See ICJ Communiqué No. 98/13 (Apr. 3, 1998).

<sup>3</sup> Request for an additional judgment filed by Slovakia on September 3. See ICJ Communiqué No. 98/28 (Sep. 3, 1998).

<sup>4</sup> Application of Nigeria filed on October 28. See ICJ Communiqué No. 98/34 (Oct. 29, 1998).

<sup>5</sup> Special Agreement of May 31, 1997 (entered into force May 14, 1998), notified to the Court on November 2. See ICJ Communiqué No. 98/35 (Nov. 2, 1998).

<sup>6</sup> Application of Guinea filed on December 28. See ICJ Communiqué No. 98/46 (Dec. 30, 1998).

<sup>7</sup> The request was filed on August 10 and is embodied in ECOSOC Decision 1998/297 (Aug. 5, 1998). See ICJ Communiqué No. 98/26 (Aug. 10, 1998).

*Bahrain*. On October 9, Paraguay filed its Memorial in *Vienna Convention on Consular Relations*. Botswana and Namibia each filed a Reply in *Kasikili/Sedudu Island* on November 27. In *Difference Relating to Immunity*, written statements by the UN Secretary-General and Costa Rica, Germany, Italy, Malaysia, Sweden, the United Kingdom and the United States were received by October 7, and Greece was given leave for late filing on October 12. Written comments by the Secretary-General and Costa Rica, Malaysia and the United States, together with a written communication from Luxembourg, were submitted by November 6. On November 12, Cameroon filed its written observations on Nigeria's Application in *Request for Interpretation*. On December 7, Hungary filed a written statement of its observations on Slovakia's request for an additional judgment in *Gabčíkovo-Nagymaros Project*.

### Orders

Nineteen Orders were made by the Court, the President, the Vice-President and the senior judge in 1998, most of which concerned time limits.<sup>8</sup> The Court's Order of March 10 upheld the admissibility of the counterclaim filed by the United States in the *Oil Platforms* case.<sup>9</sup> On March 30, the Court issued two separate Orders fixing time limits for the filing of the Counter-Memorials of the United Kingdom and the United States in the *Lockerbie* cases. On April 9, the Court issued a unanimous Order indicating provisional measures of protection in *Vienna Convention on Consular Relations*. The case was subsequently discontinued at the request of Paraguay and removed from the General List by the Court's Order of November 10.

### Hearings

In 1998 the full Court held public sittings (hearings) in four cases: *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) (March 2–11), *Vienna Convention on Consular Relations* (Provisional Measures) (April 7), *Fisheries Jurisdiction* (Preliminary Objections) (June 9–17) and *Difference Relating to Immunity* (December 7–8 and 10).

### Judgments

In 1998 the Court handed down three decisions on preliminary objections, one on jurisdiction and none on the merits of a case. On February 27, the Court issued two separate Judgments rejecting the preliminary objections raised by the United Kingdom and the United States, respectively, in the *Lockerbie* cases.<sup>10</sup> The Court's Judgment of June 11 rejected Nigeria's preliminary objections in *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*).<sup>11</sup> Finally, on December 4, the Court issued a

<sup>8</sup> Full Court Orders fixing time limits were issued in *Kasikili/Sedudu Island* (Feb. 27), *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Mar. 30), *Land and Maritime Boundary between Cameroon and Nigeria* (June 30), and *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Nov. 10). Orders extending time limits were issued in the *Oil Platforms* (Dec. 8) and *Genocide* cases (Dec. 11). President Schwebel's Order of January 22 extended time limits in the *Genocide* case. Vice-President Weeramantry issued three such Orders, in *Vienna Convention on Consular Relations* (Apr. 9, fixing time limits); *Oil Platforms* (May 26, extending time limits), and *Vienna Convention on Consular Relations* (June 9, extending time limits); and the senior judge, Judge Oda, issued four such Orders, in *Difference Relating to Immunity* (Aug. 10, fixing time limits); *Request for Interpretation* (Oct. 29, fixing time limits), and *Lockerbie* (*Libya v. UK*) and (*Libya v. U.S.*) (Dec. 17, extending time limits).

<sup>9</sup> For a summary of this decision, see 92 AJIL 508 (1998).

<sup>10</sup> Slip opinions available from the ICJ Registry and the ICJ's Web site, *supra* note 1. These decisions are summarized in 92 AJIL 503 (1998).

<sup>11</sup> Slip opinion available from the ICJ Registry and the ICJ's Web site, *supra* note 1. For a summary of this decision, see 92 AJIL 751 (1998).

Judgment holding that it lacked jurisdiction over Spain's Application in *Fisheries Jurisdiction (Spain v. Canada)* on the basis of a reservation contained in Canada's declaration accepting the Court's compulsory jurisdiction.

#### PRESIDENT'S ADDRESS

In October, President Stephen M. Schwebel addressed the General Assembly of the United Nations on the occasion of the presentation of the Court's annual report.<sup>12</sup> He explained that, while the number of cases before the Court and the range of issues involved have significantly increased, the Court has not enjoyed a proportional growth in its resources; its current annual budget of around \$11 million represents a smaller percentage of the total United Nations budget than in 1946. At the same time, the international community, including the United Nations, has established other tribunals to adjudicate international disputes and international crimes. He expressed the view that "[t]he proliferation of international courts at the same time raises the question of the role of the International Court of Justice, and of problems proliferation may pose."<sup>13</sup> Although he pledged that the Court would work harmoniously with other international tribunals, the President stressed the unique characteristics of the ICJ as the principal judicial organ of the United Nations: (1) it is a factor and actor in the maintenance of international peace and security; (2) it is the most authoritative interpreter of the legal obligations of states in disputes between them; (3) it has acted as the supreme interpreter of the United Nations Charter; and (4) it is the only truly universal judicial body of general jurisdiction.

The relative erosion of the ICJ's funding has resulted in an enlarging gap between the conclusion of the written proceedings and the opening of the hearings in cases. Reminding the Assembly that the Court must be afforded the resources to work with full effectiveness and dispatch, the President complained of the shortage of staff, especially translators, secretaries and clerks for judges, and of funds for the Court's publication program, among other concerns. He warned that justice delayed owing to the inadequacy of resources may be justice denied. This could discourage states from resorting to the Court.

#### COMPENSATION

On the occasion of its three-year review of the conditions of service of the Members of the Court, the Fifth Committee of the General Assembly, at its forty-third meeting on December 14, adopted, without a vote, a draft resolution that approved the recommendations of the Advisory Committee on Administrative and Budgetary Questions,<sup>14</sup> inter alia, to increase the judges' annual remuneration from \$145,000 to \$160,000, effective January 1, 1999.<sup>15</sup> This draft resolution was adopted as Resolution 53/214 by the General

<sup>12</sup>The full texts of the Address by the President of the International Court of Justice, Judge Stephen M. Schwebel, to the General Assembly of October 27, 1998 [hereinafter President's Address], and Statement by Judge Schwebel to the Sixth Committee of October 30, 1998, are available at the ICJ's Web site, *supra* note 1. Attached to the Court's annual report is its response to General Assembly Resolution 52/161, para. 4 (Dec. 15, 1997), inviting the Court to submit its "comments and observations on the consequences that the increase in the volume of cases before the Court has on its operation." See Consequences that the increase in the volume of cases before the International Court of Justice has on the operations of the Court, Report of the Secretary-General, UN Doc. A/53/326/Corr.1 (1998).

<sup>13</sup>President's Address, *supra* note 12.

<sup>14</sup>See UN Docs. A/53/7/Add.6, and A/C.5/53/L.27 (1998). For the Report of the Secretary-General containing slightly different proposals, see UN Doc. A/C.5/53/11 (1998).

<sup>15</sup>See UN Doc. A/C.5/53/L.27, at 14, paras. 26-28 (1998). For the text of the draft resolution, see *id.* at 20, and UN Doc. A/C.5/53/L.25 (1998). In accordance with Article 32(5) of the ICJ Statute, the salaries,

Assembly at its ninety-third plenary meeting on December 18. In addition, the Assembly adopted a fundamental change in the retirement pension regime for ICJ judges, abolishing the fixed-amount system that had been in place since 1990.<sup>16</sup> Effective January 1, 1999, the annual pension of an ICJ judge will be equal to half of the annual salary of a judge who has completed a full nine-year term. A proportional reduction will apply to a judge who has not completed a full term. The new scheme represents a departure from current practice in that a reelected judge who joined the Court after January 1, 1999, will no longer receive any increase in pension. The new pension system will be applied with prospective effect, so that it is inapplicable to serving judges currently in office who have been or are reelected. The old pension regime will therefore continue to apply to the Members of the Court in office on January 1, 1999.<sup>17</sup>

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allowances and compensation of the Members of the Court shall be fixed by the General Assembly and may not be decreased during their term of office.

<sup>16</sup> See GA Res. 45/250B (Dec. 21, 1990). Under the old regime, a judge who had served one full nine-year term received a pension of \$50,000 and a judge who had completed two full terms received \$75,000, with proportionate reductions for judges having served less than a full term. According to Article 32(7) of the ICJ Statute, Members of the Court are entitled to retirement pensions whose specific conditions are governed by regulations adopted by the General Assembly. The Assembly adopted a change in Article 7(2) of the Pension Scheme Regulations whereby any revision of pension payments will automatically be based on the same percentage and the same effective date as salary adjustments. See UN Doc. A/C.5/53/L.27, at 20 (1998).

<sup>17</sup> These judges will continue to be entitled to receive one three-hundredth of the pension benefit for each further month of service past nine years, up to a maximum pension of two-thirds of annual salary. The new pension regime will be implemented in three stages: (1) January 1, 1999, pension level increases by 20% to \$60,000; (2) January 1, 2000, level increases another 16.7% to \$70,000; and (3) January 1, 2001, level increases by a further 14.3% to \$80,000. See UN Doc. A/53/7/Add.6, at 4, para. 17 (1998). Finally, the Assembly decided to maintain the level of the special allowances of the President (\$15,000 a year) and the Vice-President when acting as President (\$94 a day, subject to a maximum of \$9,400 per year) and the compensation system for judges *ad hoc* (one three-hundred-and-sixty-fifth of the annual salary of a member of the Court for each day they exercise their functions in the case for which they were appointed).

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## BOOK REVIEWS AND NOTES

EDITED BY RICHARD B. BILDER

*The Iran-United States Claims Tribunal.* By Charles N. Brower and Jason D. Brueschke. The Hague, Boston, London: Martinus Nijhoff Publishers, 1998. Pp. xx, 911. Index.

In the vast and ever-growing literature surrounding the Iran-United States Claims Tribunal in The Hague, this volume by Charles N. Brower, a former judge of the Tribunal who is now an attorney and arbitrator in Washington, D.C., and Jason D. Brueschke, who was a legal assistant at the Tribunal, will be reckoned among the most important and useful.<sup>1</sup> The American Society of International Law has awarded it a certificate of merit recognizing its "high technical craftsmanship and high utility to practicing lawyers." But to suggest that the book is merely a specialized reference volume undervalues its significance. The late Professor Richard B. Lillich rightly predicted that the Tribunal would be

the most significant international arbitration in history.... If not in number of claims, then certainly in amount of money and complexity of issues involved, it far exceeds its predecessors.... The largest and most important international arbitration to date, it surely will influence the development of the law of international claims well into the coming century.<sup>2</sup>

Despite the fact that its awards are published, the volume and complexity of the Tribunal's decisions have left its jurisprudence inaccessible, placing an increased premium on studies that can make sense of its often discordant (if

not downright contradictory) precedents. More important, any review of the Tribunal and its work must examine the unique diplomatic conditions that gave rise to the institution, its peculiar jurisdictional limitations, and the special procedural and evidentiary regime in force there. Brower and Brueschke admirably provide this context.

The exposition is impressive. Part 1 gives an overview of the establishment and jurisdiction of the Tribunal, with an especially good treatment of the latter subject (one that is often overlooked). Part 2 examines the Tribunal's contributions to the practice of international arbitration. This section properly emphasizes the application of the UN Commission on International Trade Law (UNCITRAL) Rules to problems of internal organization and competence of chambers and individual arbitrators, as well as to the Tribunal's evidentiary practices and exercise of its powers of awarding interim measures of protection and of reopening awards. The authors rightly note that many Tribunal awards are puzzling unless one understands how the Tribunal assigned burdens of proof to the parties, how experts were used (or misused), and how various forms of written evidence were employed by the litigants. The authors observe that "[p]arties are largely left to their own wits in deciding how to prove their cases" (p. 191), but their analysis would surely assist any counsel in future arbitral fora to appreciate multicultural approaches to fact-finding (see pp. 667-68).

Part 3 looks at the Tribunal's influence on the development of doctrines of public international law. I found this section of exceptional interest, especially its consideration of the problems of treaty interpretation, the claims of dual nationals and the disposition of the many wrongful-expulsion cases that were filed before the Tribunal and later settled by Iran and the United States. There was an obvious synergy in this grouping of issues. For example, the status of the dual national claims turned on the proper construction of a provision in the 1981 Algiers Accords, which established the Tribunal. Similarly, although the authors criticize the

See, e.g., *THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1931-1983* (Richard B. Lillich ed., 1984); JOHN A. WESTBERG, *INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1991); AIDA B. AVANESSIAN, *IRAN-UNITED STATES CLAIMS TRIBUNAL IN ACTION* (1993); WAYNE MAPP, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL: THE FIRST TEN YEARS, 1981-1991* (1993); GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1996); *THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY* (Richard B. Lillich & Daniel Barstow Magraw eds., 1998).

<sup>1</sup> Richard B. Lillich, Remarks, 76 ASIL PROC. 5, 5-6 (1982).

Tribunal's inconsistent application of canons of treaty interpretation in the Vienna Convention on the Law of Treaties, they do acknowledge that its jurisprudence on this subject is "extensive and generally well reasoned" (p. 287). They also present a clear and detailed discussion of the treatment of claims by dual nationals possessing "dominant and effective nationality" of one of the claimant nations. And although the book could not exhaustively explore the Tribunal's "novel" case law surrounding the "caveat" of Case A/18<sup>3</sup> (because the Tribunal is continuing to issue awards on this subject), its treatment is balanced and good.

The authors reserve harsh criticism for the Tribunal's wrongful-expulsion decisions, characterizing some as "nonsensical," "incomplete and unsatisfactory," and "inconsistent" (pp. 358, 364-65). While in some respects this disapproval is justified, it may be pointed out that the Tribunal was able to decide only a handful of cases implicating this problem and, consequently, did not have an opportunity to reach a jurisprudential equilibrium on the subject.

Part 4 concerns the Tribunal's impact on the doctrines of liability and compensation for government expropriations of foreign-owned property. This section also illustrates, I think, the extraordinary depth of analysis and coverage of the volume. The authors begin by considering which acts engage state responsibility for expropriations and other measures affecting property rights. The text then examines the Tribunal's jurisprudence on the doctrines of attribution; causation, and defenses to state responsibility. These threshold issues of state responsibility—so often ignored in other works—are ably presented here. Although I would have preferred even more detailed treatment of host government liability for failing to protect foreign property and more searching consideration of a police power defense to claims of creeping expropriations (or regulatory takings), I think these chapters are an enormous contribution to the literature. The authors

wisely chose to explicate these antecedent issues of state responsibility. Too often, Tribunal jurisprudence has been exploited in order to score points in collateral areas of international law, and the status of the Tribunal as an institution reflective of the principles of state responsibility and the practices of international claims settlement has been conveniently forgotten. This book avoids this methodological trap.

Chapters 14-17 take up the perennially contentious issue of compensation for expropriations of foreign-owned property. Here again, the analysis is detailed and deep, with discussion proceeding in discrete steps covering (1) Tribunal case law on the standard of compensation (under both customary international law and the 1955 Treaty of Amity between Iran and the United States), (2) the quantum of compensation that follows from a particular selection of a standard of compensation, and (3) the methods of valuation the Tribunal employed for expropriated business entities and tangible property. On this last subject, the authors attempt to synthesize and harmonize the Tribunal's precedents—no easy task. The book's strongest language and best reasoned arguments emerge in their critique of the "aberrant" results in the *Amoco International Finance Corp.*<sup>4</sup> and *Shahin Shaine Ebrahimi*<sup>5</sup> awards (pp. 505-12, 531-36), two cases that ostensibly relaxed the standard of compensation due in large-scale nationalizations of foreign property in Iran, decisions made over the dissent of one or more of the American arbitrators (including Judge Brower). The authors are right to be concerned about the Tribunal's jurisprudential reputation in articulating clear and definitive rules of compensation for expropriations of property by revolutionary governments. But while the Tribunal achieved a high level of doctrinal consistency in this regard, it may be unreasonable to hope for total consistency in view of the large number of awards it issued and the widely divergent backgrounds of the arbitrators who served with the institution.

The conclusion to the volume examines two aspects of the Tribunal's legacy: first, the extent to which its decisions will be a source for the resolution of public international law controversies in the future and, second, its structural and institutional success as an arbitral forum.

<sup>3</sup> Decision No. 32-A18-FT, 5 Iran-U.S. Cl. Trib. Rep. 251 (1984 I). The A/18 caveat allows the Tribunal to decide that a dominant and effective national of the United States nonetheless abused that status in acquiring rights or property in Iran. The Tribunal's caveat cases have thus focused on substantive aspects of national laws that restrict ownership of property to citizens. See, e.g., *Saghi and Islamic Republic of Iran*, AWD 544-298-2 (Jan. 22, 1993), summarized in 87 AJIL 447 (1993).

<sup>4</sup> Partial Award, AWD 310-56-3, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987 II).

<sup>5</sup> AWD 560-44/46/47-3 (Oct. 12, 1994).

Or the first point, the authors conclusively rebut the suggestion that the Tribunal's jurisprudence is a *lex specialis*, merely the product of a peculiar (and divisive) phase of international relations. If that argument were embraced, no award of an international claims settlement institution would be worthy of subsequent recognition and application. On the latter issue, they are understandably sanguine about the legacy of the Tribunal. Although they acknowledge that the model of dispute settlement adopted in the Algiers Accords and exhibited in the Tribunal's practice may not be ideal for every situation, they join the scholarly consensus that the Tribunal will continue to exercise substantial influence into the next century. As they observe, the Tribunal has a marked resemblance (in Samuel Johnson's aphorism) to a dog that can walk on its hind legs: "It is not done well; but you are surprised to find it done at all" (p. 657). Dr. Johnson's dog would have had an appreciative bark for this book, too.

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*Bleedy Constraint: War and Chivalry in Shakespeare.* By Theodor Meron. New York: Oxford University Press, 1998. Pp. vii, 230. \$29.95.

Varieties of the "law and . . ." movement come and go; at present, law and economics is on the crest of a wave in American legal academia. Law and literature cannot at the moment be viewed as a rival, but as demonstrated by Theodor Meron's latest book, it is certainly alive and flourishing.

The author, a professor at the New York University School of Law, has already made a distinguished contribution to the genre in his *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (1993). This book was all the more notable since the "law and . . ." movement has had relatively little influence on scholarship in international law, partly because it is obvious that international law is so inextricably interrelated with other disciplines that no special movement is needed to point this out. In his earlier book, Meron sought to bring his expertise as a modern scholar of the laws of war (or international humanitarian law as it is now called) to bear upon Shakespeare's account of the Agincourt campaign. One reviewer of that book suggested that Meron had not fully addressed an important

and interesting issue: today, the enterprise of ameliorating the nastiness of war has been taken over by lawyers. One consequence of this has been an attempt to produce authoritative texts, in the form of conventions and the like, specifying what may and may not lawfully be done. Laws are thus relied upon to perform the function previously entrusted to conceptions of honor; this change may not be for the better, though that is hard to judge.

The legalization of the *jus in bello* has been taken very far. For example, British soldiers carry little cards in their pockets that set out, in the form of rules, when they may shoot people and when they may not. Thus, no soldier can claim that he did not know what the rules were. The process of legalization has a long history. While it did not begin in the nineteenth century with Francis Lieber's Code of 1863 or with the Hague Conventions, it has certainly accelerated in modern times. Indeed, the legal literature on the subject is now voluminous.

However, under an older tradition, by no means dead, the humanization of warfare—insofar as that is possible—depended not so much on legal texts and doctrines as on customary practices observed by an aristocratic warrior class that was, to some degree, directly influenced by ideals of honor and chivalry. It is this older chivalric tradition and, less fully, its decline and partial replacement by concepts of legality, which is the theme Meron explores in his new book. Meron does this by examining the ideas and values expressed by Shakespeare in his treatment of war. Shakespeare's writings are, of course, full of legal language and conceptions. Commentators have long been interested in this feature of the texts. Meron is, however, an innovator in his analysis of the international legal ideas to be found in the plays, as well as in the culture underlying them.

Meron begins his book with a short chapter pointing out that commitment to values of honor and mercy, together with aristocratic ideas of conduct becoming "an officer and gentleman," remain significant in the modern world of humanitarian law. He moves on in chapter 2 to discuss Shakespeare's general attitude toward the legitimacy of war itself. In medieval Christian thought, the just war was legitimate, and chivalry tended to positively glorify the pursuit of rightful claims and honor through war; by a sort of inevitable logic, all wars were illegitimate for one side, the one that lacked a just cause. Meron argues that Shake-

speare, writing at a time when the chivalric ideals were perhaps less influential, moved toward a position in which *all* war was condemned. Chapter 3 discusses Shakespeare's presentation of the ideals of chivalry in ancient warfare, for example, in mythical Britain. Chapter 4 compares Shakespeare's treatment of the Trojan War with that of Homer in the *Iliad*, which provides a vehicle for Meron to contrast a culture of honor rooted in the avoidance of shame with a culture in which guilt rather than shame is the predominant conception. Chapter 5, *The Brave or the Wise*, addresses the chivalric ideal of heroic death—the Thermopylae factor—which was carried to its ultimate in World War I when it became the primary function of the junior officer to be killed. In chapters 6 and 7, Meron discusses the extent to which Shakespeare through his characters debunks the myth of the perfect knight. Meron argues that Shakespeare was not hostile to the ideal of chivalry; indeed, he wished to preserve the influence of its underlying humanitarian ideas at a time when the savagery of war was increasing. This leads Meron to discuss Shakespeare's presentation of situations in which the ideals of chivalry were under threat or simply not observed. Chapter 9 examines Shakespeare's treatment of issues of accountability for the crimes and atrocities committed in the course of war, a topic currently of considerable public interest. A short epilogue argues for the value of refocusing attention on "broad, simple and comprehensible principles of humanity. Broad principles and norms can sometimes be more effective than technical rules in ostracising and shaming violators and, therefore, in influencing behaviour" (p. 204). I take Meron as suggesting that the legalization of the subject has tended to diminish awareness that the attempt to humanize war is essentially an ethical and not a legal matter.

This is an attractively written and very readable book. But some may wonder as to the value of such a marriage of legal and literary scholarship for those whose interests are primarily legal rather than literary. I think that the answer lies in the fact that law is not an autonomous system. Even in the heyday of legal science, when writers gave the impression that they thought law was autonomous, the reality was that law was conceived to be a branch of ethics. There are, perhaps, some few substantive legal values, such as the concept of a fair trial, which are related to procedures that are specifically

legal. But law is, in the main, merely a vehicle for the expression of values that lie outside itself. In international humanitarian law, at least, those values are surely ethical in nature and, to a high degree, timeless. Understanding them and the problems of expressing them in action must surely be advanced by a study of how they were expressed, illustrated, developed, used, criticized and demystified in the war plays of Shakespeare. No better guide could be found than Meron's book.

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*International Law: Classic and Contemporary Readings*. Edited by Charlotte Ku and Paul F. Diehl. Boulder CO, London: Lynne Rienner Publishers, 1998. Pp. vii, 568. Index. \$49.95, cloth; \$24.95, paper.

This volume not only collects some of the best essays written on international law during the past fifty years but also offers a bold new perspective on the subject. The editors, ASIL Executive Director Charlotte Ku and Paul F. Diehl, professor of political science at the University of Illinois, reconceptualize international law as two distinct but interactive systems: an operating system and a normative system. "First and foremost," they insist, international law is an operating system, making "the daily business of international relations and politics" possible (p. 4). International law, in short, keeps the world running.

Second, but equally significant, international law is a normative system, generating the values that address some of the most difficult problems of our time. As a normative system, international law confronts profound questions—including whether international law as operating system can meet its challenges. This operating system is constructed and maintained by states with immediate interests that often conflict with the long-term objectives of the normative system. These are familiar dilemmas. But the editors' fresh perspective puts old insights in a new light and illuminates more recent work, including cutting-edge post-Cold War scholarship. While all the essays fit into the dual systems framework, the result is not uniformity but, rather, a rich range of often irreconcilable perspectives, a series of passionate debates supported by rigorous scholarship.

After a lucid explication of the dual systems framework, part 1 concludes with two classic essays. In the first, Louis Henkin cogently describes the diffusion of power in the international system, explaining that, "[g]enerally, nations seek law they wish others to observe and are prepared to observe it themselves" (p. 20). In the second essay, John Fried classifies the wide-ranging arguments against international law into four neat categories and then tersely demolishes them. Fried confirms Henkin's point that to expect international law to function like domestic law reflects a fundamental misconception. Since international law governs states, it should be compared to domestic law governing states, i.e., constitutional law. Considered in the appropriate context, international law probably functions *better* than domestic law.

Precisely *how* international law functions is the subject of part 2, *International Law as Operating System*, which begins with Leo Gross's analysis of the political forces that shaped the state system. Westphalia marked the emergence of positivist international law, premised on the equality of states and a balance of power and religious tolerance among them. Most important, it marked the triumph of a "rugged individualism of . . . heterogeneous states" (p. 70), which rejected international law as an overarching system to which states would be subservient. This remains a problematic feature of international law as an operating system, in frequent tension with its normative goals.

The next two essays discuss the sources of international law, how the operating system produces law. John King Gamble, Jr., describes the complex interplay between treaty and custom, concluding that they are best understood as "intertwined threads in the fabric of international law" (p. 81). Charles Lipson meticulously dissects the role of informal agreements. He considers their advantages—speed, simplicity, flexibility and privacy—in a wide range of real-world contexts, clarifying the relationship between their form and substance in the process.

Part 2 focuses on the users of the operating system, the participants in the international legal process. Oscar Schachter analyzes the law of state succession, explaining why "law weighs heavily on the side of continuity of obligations" (p. 28). Patrick Thornberry explains why self-determination is important to minorities. Although states typically deny that self-determination applies to minorities, Thornberry concludes that they may become more recep-

tive to such claims once they realize that "the maltreatment of their minorities is a primary cause of internal and international strife" (p. 150). Donna Arzt and Igor Lukashuk conclude this section by focusing on individuals and transnational corporations (TNCs), noting that individuals enjoy "de facto if not de jure, international personality" although their status is precarious (p. 164). TNCs, in contrast, remain outside the system, notwithstanding widespread agreement on the need for their regulation. Less developed countries (LDCs) oppose TNCs' increased participation in international law, and others are concerned about the impact of such participation on both development and the environment. The authors suggest that the former socialist states, concerned about development as well as the environment, may break the gridlock (p. 173).

As an operating system, international law must enforce, or assure compliance with, the law it produces. Harold Jacobson and Edith Brown Weiss construct an ingenious model for strengthening compliance with international environmental accords. Focusing on the relationship between international and domestic processes, and drawing on empirical data from eight states, the authors conclude that "international momentum toward concern for the environment" is the single most important factor explaining improved compliance (pp. 202–03). D. W. Bowett's essay on jurisdiction explains why compliance with law depends, in part, on the allocation of lawmaking authority among states. Bowett makes a persuasive case for "balancing" interests, an approach consistent with the "reasonableness" standard set out in the *Restatement (Third)*, but which the U.S. Supreme Court has yet to adopt.<sup>1</sup>

Part 2 concludes with a review of the legal structures that function within the operating system, beginning with Richard Bilder's eloquent essay on the International Court of Justice and the United States' renunciation of its compulsory jurisdiction. He explains why the United States should support the Court: "Perhaps a few nations can hope to 'free-ride' on an international legal system supported by most others . . . . But this course is not open to our country. For, if we choose not to play by the rules of the game, there may not be any game left worth playing" (p. 253). Shifting to the

<sup>1</sup> *Hartford Fire Ins. Co. v. California*, 113 S.Ct. 2891 (1993).

nonjudicial dispute resolution procedures of the World Trade Organization (WTO), Steven Croley and John Jackson address a recurring problem in international law: articulating a standard of review when states differ. The authors, recognizing this as a "constitutional question," conclude that there are no easy solutions (p. 276). Rather, they urge WTO panels to adopt a "reasonable, nuanced approach," drawing, perhaps, on "theories of subsidiarity," and to resist the temptation to impose national solutions on international problems (pp. 276–77). Part 2 concludes with Christopher Blakesley's probing article on the still-substantial impediments to an effective permanent war crimes tribunal. He asks, for example, whether the tribunal will actually *deter* war crimes or simply encourage their perpetrators to better conceal them. Such questions serve as a natural bridge to part 3, which focuses on international law as a normative system.

Part 3 opens with Oscar Schachter's well-known essay on self-defense. Schachter suggests that the self-defense norm can be clarified through *lex specialis*, but that the relationship between national security and the Charter prohibition on the use of force is "inevitably complicated and fluid" (p. 322). Ultimately, however, self-defense must be determined according to international standards. Anthony Clark Arend and Robert Beck argue that these standards are somewhat fluid themselves. Values have changed in the fifty years since the Charter, they point out, and the use of force paradigm must change as well. While peace was the ultimate value under the Charter, many now claim that justice is more important. The authors propose a new, albeit still restrictive, *jus ad bellum* to address this paradigm shift.

This emerging norm of justice includes, perhaps most important, human rights. Philip Alston critically assesses the UN record, observing that while there has been "immense progress," the United Nations "must face up to [its] failures" as well (p. 357). Focusing on three particularly heated debates—universality, indivisibility and North-South solidarity—Alston's essay epitomizes the sophistication and candor he calls for. He cuts to the heart of the universality debate, for example, by distinguishing between "core, physical integrity rights" and those whose promotion depends on "the nature of the society, its traditions and culture" (p. 361). He concludes with an energizing vision, calling for a "more probing, more self-conscious and more

eclectic" approach to human rights (p. 362). The growing importance of human rights (described by Alston), and the relative decline of peace as a value (noted by Arend and Beck), are reflected in changing views of humanitarian intervention. As Jarat Chopra and Thomas Weiss observe, "'humanitarian' and 'intervention' are contradictions when viewed through the prism of sovereignty" (p. 370). From a human rights perspective, however, "[w]hat is involved is not the right of intervention but the collective obligation of states to bring relief and redress in human rights emergencies" (p. 385, citing Javier Pérez de Cuéllar). The authors conclude that restricting humanitarian intervention to *collective* actions adequately reduces the risks of abuse.

Collective action is similarly key in dealing with the environment. As Alexandre Kiss observes, "above a certain dimension [environmental] problems are necessarily international ones" (p. 391). Kiss suggests that measures to protect the environment can be grounded in traditional international law, the notion of shared resources and the emerging conception of "commonage." Catherine Tinker's essay on biodiversity suggests another useful conception: the "precautionary principle," i.e., the need for "preventive action in the face of scientific uncertainty about future harm" (p. 415). Tinker concludes that the "duty to take precautionary action [should] be seen as one of a cluster of procedural norms [like] the duties to warn other states, to mitigate damages, and to assist in case of emergency" (p. 437). Christopher Joyner and Elizabeth Martell focus on the process through which substantive norms are agreed upon, analyzing the United Nations Conference on the Law of the Sea to synthesize lessons for negotiations on managing the commons. They describe five specific approaches, ranging from a piecemeal approach to a comprehensive linkage of multiple issues, which can be used alone or in combination to negotiate a global commons regime. The need for such a range of approaches in complex contexts is confirmed in the essay on the law of outer space by Katherine Gorove and Elena Kamenetskaya. The increase in commercial activities in space has led to an increase in space law, as states with space capability legislate domestically and those without it demand equity. The authors elucidate the legal tensions and the need for international cooperation, concluding that "the first-

come, first-served principle . . . no longer has legal significance" (p. 485).

Norms regarding economic activity are the subject of the next two essays. In the first, John Jackson describes the tensions between "trade liberalization policies designed to promote . . . world welfare" and "environmental goals, human rights norms, and labor standards" (p. 515). Clear-sighted and pragmatic, Jackson stresses lawyers' responsibility to help shape the constitutional law of international economic relations to "protect longer range constitutional provisions from certain short-term or ad hoc expediency temptations of governments or other players" (p. 516). The second essay, Burns Weston's thoughtful analysis of the Charter of Economic Rights and Duties of States, is a timely reminder of the sea changes in the international climate since the first calls for a "New International Economic Order." Focusing on the less developed countries' rejection of the international law principle of "appropriate compensation" for nationalized property, Weston urges that the term be reformed so as to "accommodate" the principle of "full permanent sovereignty as responsibly conceived," i.e., infused with basic-needs considerations (p. 543).

Part 4 gives Henkin the well-deserved last word in *The Future of International Law*. In broad strokes, he brings us up to a present in which "there is no Second World, therefore no Third World. But surely we are not one world" (p. 551). After describing the reactivation of the UN Security Council in an international system "characterized by divisions that are pragmatic rather than ideological, economic rather than political" (p. 555), he concludes on an optimistic and forceful note:

There is urgent need for some new law, an instrument of politics, and there can be no effective law if politics does not fill it. . . . Political will to make, and induce compliance with law requires general agreement, which requires a will by some—the rich, the mighty, the wise, the brave—to lead, and by all—including the many poor—to join and help. (P. 568)

It is a compelling conclusion to a compelling collection. If I could recommend only one book to someone beginning her career as a teacher of international law, this would be it—not because it is the only book she will need, obviously, but because it will show her why international law can never be encapsulated in one volume. If I could persuade a skeptic—one who

still doubts that international law is "real law"—to read one book, this would be it. Even if he is not swayed by its powerful rhetoric, he will be deflated by its unsentimental pragmatism. But *International Law: Classic and Contemporary Readings* deserves a far wider audience than neophytes and skeptics. It is a rich, deeply satisfying and provocative collection, in which all international lawyers will find jewels.

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*Joining Together, Standing Apart: National Identities after NAFTA*. Edited by Dorinda G. Dallmeyer. The Hague, London, Boston: Kluwer Law International, 1997. Pp. xxiii, 150. Index. Fl 120; \$74.50; £47.

The North American Free Trade Agreement (NAFTA) has generated voluminous analysis by international legal scholars and practitioners in all three member countries (Canada, Mexico and the United States). However, few in the legal community have addressed the broader political, economic and social questions raised during the negotiation and approval processes and subsequent to its entry into force. Dorinda Dallmeyer, research director of the Dean Rusk Center for International and Comparative Law at the University of Georgia and long a student of North American trade issues, is to be commended for organizing a conference and publishing the resulting papers, which enrich black-letter legal portraits of NAFTA with a multicolored landscape. The collection provides subtle insights into the concerns underlying what many consider a shrill debate between NAFTA friends and foes.

Dallmeyer's preface and a contextual foreword by Robert Pastor, a professor at Emory University's Carter Center, promise the reader an evaluation of the long-term implications of NAFTA for economic integration, cultural sovereignty and environmental sustainability of the participating countries. The papers do indeed address various challenges to governance presented by the globalization of production, which go well beyond the goal of ending trade barriers among the three parties promoted by the Agreement.

Two chapters provide particular insight into Mexico's ongoing effort to maintain economic growth, pursue democratization, and address widespread poverty and unequal distribution of

wealth. In chapter 2, Alejandro Nadal, profesor-investigador at the Center for Economic Studies, the College of Mexico, critically assesses the market economy model pursued by Mexico since the 1982 debt crisis. NAFTA was, in this context, part of a broader strategy of privatization and deregulation by the Salinas administration to attract foreign investment to cover the then current account deficit. However, according to Nadal, Mexico failed to accompany the opening of its markets with sound industrial policy or the upgrading of worker skills. As it has turned out to date, NAFTA's contribution to increased employment in Mexico has largely been in the *maquiladora* sectors unconnected to the domestic economy, with 98 percent of inputs imported and 70 percent of Mexico's exports still concentrated in four sectors.

Nadal's message that free trade alone is not sufficient for equitable development is more fully explored by economist and former academic Léon Bendesky (chapter 3). Beginning with the premise that austerity is "a defining character of contemporary capitalism and thus a real cultural issue" (p. 64), Bendesky highlights the Chiapas crisis as evidence that Mexico's rapid modernization was leaving behind too many people. He finds fault with Mexico's domestic economic policy making as reflected in the devaluation of the peso, continued constraints on domestic demand, and the evolution of Mexican domestic political reform. He concludes that economic reforms were accompanied neither by necessary complementary policies to broaden the industrial base in a manner that would cushion the Mexican economy from external shock nor by any effective restructuring of the balance of political powers.

A Canadian perspective (chapter 4) by Daniel Salée, a professor at Concordia University, begins with a succinct review of the tenor and character of the cultural nationalists' debate in English and French Canada. He addresses whether "the sociocultural project articulated by Quebec sovereignists [*sic*] and nationalists over the past three decades [*is*] still feasible within a wider, globalizing context of continental integration" (p. 77). Although NAFTA does not divide separatists and federalists in Canada, for Salée it is a concrete manifestation of globalization. With some hyperbole, he argues that globalization and consequent economic restructuring are "bringing about the final breakdown of the post-war social contract" by unleashing "homogenizing market forces" that

render "obsolete and irrelevant familiar parameters of social and cultural identity" (p. 78). Around the world, ethno-nationalist movements, religious fundamentalists, and those who stand to lose power or even a way of life as a result of increased globalization tend to retreat into more particularist national, social or cultural identities. This suggests that the legitimacy of the state is being challenged from within. The current debate in Quebec reveals similar tensions in microcosm: Quebec "sovereignists" define their goal in national and territorial terms (whereas within the province various ethnic and cultural communities, including most prominently the aboriginal population, themselves seek recognition of their unique status rather than independence). According to Salée, Canada's 1982 constitution ended the "equilibrium" of two founding peoples and replaced it with "constitutional minoritarianism," giving Quebecois the same status as any other minority. As a consequence, in a world where global economic forces limit the authority of the nation-state in its own territory and where political communities seek "autonomous public space," a future political community in Quebec "would bear little resemblance to that which sovereignists are currently longing for" (p. 88).

The analysis of cultural identity in the United States (chapter 5), by Serena Nanda and Jill Norgren, both professors at the City University of New York, exemplifies thorough legal scholarship. Their comprehensive review of U.S. court decisions fully supports their conclusion that NAFTA is "unlikely to provide a substantial stimulus for changes in U.S. cultural identity" (p. 92). To the contrary, they show that law has served as a means for maintaining a national identity. Cases concerning the use of languages other than English for voting, court testimony, government business and education in the United States demonstrate the strength of the ideology of English as the dominant language in that country. Following a good sociological discussion of the importance of language to ethnic and cultural identity, the authors focus in particular on the burdens placed on the growing U.S. Latino population in this respect; they point out that most public policy and court decisions reflect a reluctance to acknowledge or support the use of Spanish in official contexts and a clear opposition to any erosion of the dominant Anglo-American culture in favor of elements of Latino culture. A survey of case law on the travails of Native Americans, African-



Americans, Asians and various specific religious groups, including the Mormons and Amish, rounds out their review.

Chapter 6, on trade and the environment, by David Wirth, a professor at Washington and Lee University, is less satisfying. Repeating well-worn environmentalists' arguments that NAFTA does not adequately take account of environmental concerns, he seeks to make the case that NAFTA subordinates international environmental norms to international trade rules. He alleges more broadly that NAFTA fails to respect democratic decision making in domestic lawmaking. In his view, the U.S. fast-track approval process for trade agreements limits public participation, the international trade dispute settlement panels do not permit public access, NAFTA improperly reaches into areas heretofore within state rather than federal jurisdiction, and the executive branch may weaken domestic regulation in response to international trade dispute settlement panels. Although Wirth admits that trade rules generally require governments to "refrain from" certain actions, whereas environmental norms usually impose affirmative requirements, his discussion fails to take account of the vast literature and body of primary material, particularly from the WTO Committee on Trade and Environment and the OECD Joint Committee of Experts on Trade and the Environment, which have explored these questions more thoroughly and, in this reviewer's opinion, have reached more balanced conclusions.

Louis Ortmayer of Davidson College offers three theoretical models for analyzing the NAFTA negotiations (chapter 1). His first model utilizes a "dialectic" by which trade liberalization is countered by protectionism and is succeeded by some synthesis that is temporarily acceptable to each of the competing sides. This model can explain the fact that NAFTA's significant trade-liberalizing elements are balanced by several reservations, exceptions and protected sectors. His second model, based on so-called two-level games,<sup>1</sup> views governments as trying domestically to satisfy the demands of domestic interest groups, coalitions and politics while internationally seeking to maximize the possibility of meeting these domestic interests and simultaneously minimizing the adverse consequences of foreign affairs imperatives and the demands

of other countries. His third model looks at negotiations from the standpoint of the "strategic policy of multinational corporations" by which they are able both to take advantage of new information regarding the regulatory environment and to maximize shaping it. This third model helps to illustrate the way in which NAFTA has served the interests of large corporations. By using the apparel, electronics and auto sectors as examples, Ortmayer shows how NAFTA promotes the ability of firms to move from country-specific to regional-specific advantage.

Taken together, these essays on ostensibly disparate topics collectively address aspects of the globalization of economic activity. While NAFTA is now five years old, debate over the approval of the WTO Agreement in the U.S. Congress, criticisms of negotiations on a Multilateral Agreement on Investment, and concern about the causes and effects of the current financial crisis in emerging markets all reflect the continuing tension between the growing need for effective international economic governance and the need for accountability, transparency and social choice for citizens. Those engaged in international trade and economic law are most often primarily occupied with the former objectives—improving the precision of the substantive rules and the efficacy of rules-based dispute settlement procedures and, ultimately, modernizing the Bretton Woods institutions—which dominate today's negotiating agenda. But politically and socially, "globalphobia" is as much a reality as globalization, and it behooves the legal community to be more cognizant of societal concerns, including demands for democratic accountability in domestic economic and foreign-policy decision making, more equitable distribution of the wealth that global economic activity creates, and recognition of cultural, environmental and other non-trade public choices. Dallmeyer's collection thus promotes understanding of this broader context by bringing together Ortmayer's explanations of the political and policy-making process, Nadal's and Bendesky's assessments of Mexico's inevitable movement from *glasnost* to *apertura*, Salée's questioning of the nature of allegiance to the nation-state, Norgren and Nanda's reminder of the strength of relatively fixed U.S. cultural values, and Wirth's plea for more dialogue and reconciliation between trade and environmental regulators.

As in almost any such conference collection, a reviewer can suggest various errors and omis-

<sup>1</sup> Adapted by Ortmayer from Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of "Two-Level Games,"* 42 INT'L ORG. 427 (1988).

sions. Ortmyer too readily assumes that regional trade agreements run counter to the objectives of the multilateral trading system. Nadal and Bendesky fail to ask how much worse things might have been in Mexico had free trade not generated the revenues and employment it has since the peso crisis. Salée might have been less dismissive of the fundamental importance of the equality of English and French in the Canadian Constitution. Norgren and Nanda's work calls for a comparative analysis at least of the Canadian experience with two official languages. And Wirth, as noted, owes the reader more. Nonetheless, the collection provides both a reflective examination of the issues and a useful reference. It is a worthwhile addition to the library of those interested in NAFTA, in trade issues more generally, or even more broadly, in the growing pains of today's internationalized economic system.

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*The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.* By John R. W. D. Jones. Irvington-on-Hudson NY: Transnational Publishers, Inc., 1998. Pp. xvii, 355. \$95.

Since their establishment by the UN Security Council in 1993 and 1994, the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) have been the subject of more scholarly writing than any other issue in the field of international law.<sup>1</sup> The book under review has emerged as one of the most valuable reference books available to anyone interested in doing serious research in this area.

Transnational Publishers, Inc., has pulled off something of a coup by obtaining the rights to publish R. W. D. Jones's book. The foreword by the former president of the ICTY, Antonio Cassese, indicates that the book was originally drafted by Jones, in his official capacity as assistant to Judge Cassese, to serve as a guide for the Tribunal's judges. Normally, such a work either

would not be made publicly available or would be published by the United Nations Department of Information. Given that the ICTY and the ICTR each have their own Web site,<sup>2</sup> another option would have been for Jones's guide to be made available over the Internet, thus ensuring that the information and analysis could be extensively disseminated and instantly updated. Anyone familiar with UN bureaucratic practice should realize how extraordinary it was that Judge Cassese instead authorized publication of the book by a commercial publisher. By directly publishing Jones's book in paperback, the publisher was able to offer it at a reasonable price (for an academic work), which should ensure its widespread availability.

Unlike a number of other books on these Tribunals, which provide a legislative history of their Statutes and an analysis of their constituent instruments and the historic precedents relevant to their work,<sup>3</sup> Jones's book is a digest of decisions: he has produced the equivalent of a mini-*Corpus Juris Secundum* of the case law of the two Tribunals.<sup>4</sup> The book is organized to correspond to the provisions of the Tribunals' Statutes and Rules of Procedure. Each section contains relevant excerpts (usually a few paragraphs long) from the decisions. While it generally includes little or no accompanying analysis, the book makes the primary material available to the reader in a well-organized and easy-to-research form—something that is not easily done over the Internet. If there is a serious weakness, it is the absence of a comprehensive and detailed subject index (which should be added to future editions).

Jones's book is current through September 1997 and therefore includes very little of the ICTR's jurisprudence. The ICTY's early jurisprudence, which is covered, involves some of

<sup>2</sup> The Yugoslavia Tribunal's Web site is (<http://www.un.org/icty>); the Rwanda Tribunal's Web site is (<http://www.un.org/icttr>).

<sup>3</sup> See, e.g., VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS (2 vols., 1995); M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995); VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2 vols., 1998); and M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW (2d ed., 3 vols., forthcoming).

<sup>4</sup> *Corpus Juris Secundum* is a comprehensive multi-volume legal encyclopedia of American case law published since 1938.

\* The views expressed herein are those of the reviewer and do not necessarily represent the views of the Government of Canada.

<sup>1</sup> A LEXIS search revealed the existence of over three hundred published articles about the Tribunals since their establishment.

the most important issues facing the Tribunals. Of special note is the ICTY appeals chamber's groundbreaking determination in its first case (*Prosecutor v. Tadić*) that the creation of the Tribunal was within the competence of the UN Security Council. The pretrial decisions and judgment in that case also addressed fundamental procedural questions about the form of the indictment, the application of the *non bis in idem* principle, and the use of anonymous witnesses, hearsay statements, and video-link testimony. Equally significant was the ICTY's determination in a series of "Rule 61 hearings" of what constitute grave breaches of the Geneva Conventions, war crimes in internal armed conflict, genocide and crimes against humanity, as well as the contours of command responsibility of political and military leaders for these crimes. Other important rulings covered in Jones's book include the analysis by the ICTY of the limits of its power to issue and enforce subpoenas in a pretrial determination in the case of the Croatian general Tihomir Blaškić and its discussion of the defenses of superior orders and duress, as well as what constitute valid aggravating and mitigating circumstances in the sentencing judgment of Dražen Erdemović.

Between September 1997 and April 1999 (when this book review went to press), the jurisprudence of the Yugoslavia and Rwanda Tribunals expanded exponentially. During this time, both Tribunals concluded several cases, and the Security Council established a third trial chamber for each of the two Tribunals and appointed six additional judges to keep up with the Tribunals' increasing workload. Thus, many important decisions are not included in this edition. A common criticism of written publications in this rapidly developing area of law is that they are already out of date by the time they are published.<sup>5</sup> Yet Jones has addressed this problem by contracting with Transnational Publishers to produce yearly paperback updates of his book, which are sure to be eagerly awaited by scholars and practitioners.

My oversight of the International War Crimes Prosecution Project at New England School of Law, which, at the request of the Office of the International Prosecutor, has provided more than fifty research memoranda on legal issues

pending before the Yugoslavia and Rwanda Tribunals, leaves me in no doubt that Jones's book will prove an invaluable research tool not only for attorneys and judges working on cases before the Yugoslavia and Rwanda Tribunals, but also for professors and students doing scholarly research in this area. Furthermore, Jones's digest of the precedents of the Yugoslavia and Rwanda Tribunals could also be helpful during national ratification debates as the international community moves toward the adoption of the Rome treaty establishing a permanent international criminal court. Finally, the book should prove extremely useful to domestic courts, which may draw on the precedents of these Tribunals as they are ever more frequently called upon to decide issues involving international humanitarian law in civil and criminal cases.

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*Radical Evil on Trial*. By Carlos Santiago Nino.  
New Haven, London: Yale University Press,  
1996. Pp. xii, 207. Index.

The death in 1993 of Carlos S. Nino, professor of law at the University of Buenos Aires and a primary architect of the effort to prosecute the military leaders of the "dirty war" against subversion in Argentina, deprived the world of an important voice on the theory and practice of raising a viable democracy from the ruins of a prior authoritarian regime. Although the posthumous publication of *Radical Evil on Trial* is unlikely to convert those critics of Nino who believe he helped squander the opportunity to achieve broader retroactive justice in Argentina, this book is an important investigation of the moral, legal, and political challenges confronting democratic governments prosecuting human rights abuses committed under a previous regime.

The genesis of this book lies in the exchange between Diane Orentlicher and Nino in the *Yale Law Journal* in 1991.<sup>1</sup> In her article, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, which presaged an ex-

<sup>5</sup> See Gerry Azzata, *Keeping up with the War Crimes Tribunal: Human Rights Research into the Twenty-first Century*, 9 HARV. HUM. RTS. J. 323 (1996).

<sup>1</sup> Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Carlos S. Nino, *The Duty to Prosecute Past Abuses of Human Rights Put into Context*, 100 YALE L.J. 2619 (1991); Diane Orentlicher, *A Reply to Professor Nino*, 100 YALE L.J. 2641 (1991).

plosion of scholarly interest in the subject, Orentlicher argued that the duty to prosecute human rights violations selectively exists under international law. Nino responded by examining the context of the Argentine transition to democracy and asking whether a duty to prosecute would have aided the efforts of the Alfonsín administration to pursue retroactive justice. He concluded that such a duty could have destabilized efforts to prosecute by heightening both the demands of human rights groups for the punishment of every offender and the resistance to trials by the military. A failure to attain any retroactive justice, in turn, would have frustrated the Government's efforts to promote public consciousness regarding the rule of law and the role of the military in a democracy.

This book, which represents a fleshing out of Nino's thoughts on trials, punishment, and their relationship to democracy, is not a radical departure from his previously expressed views. What is new here is his emphasis on different facets of the subject.

The first part of *Radical Evil on Trial* explores the historical context of efforts to achieve retroactive justice. Nino provides both a comparative account of efforts at retroactive justice since the Nuremberg trials and an expanded narrative on the Argentine experience. These historical materials do not break substantial new ground, but their juxtaposition (in a later chapter on the political problems of trials) is instrumental in compiling a catalog of factors that may help to predict the relative success of efforts to impose retroactive justice. His account of the various pressures placed on the Alfonsín Government by the military, human rights groups and the Peronist opposition is often riveting, moreover, and the atrocities committed and pervasive lawlessness into which Argentine society fell retain their ability to shock.

The more original portion of the book lies in the author's exploration of the political, moral, and legal dimensions of retroactive justice. Nino provides a fresh perspective by applying his liberal political philosophy, which emphasizes the role of public deliberation and democratic decision making, rather than a legalistic approach emphasizing judicial decisions, state practice, and treaties. For example, one of the most important normative legal questions that efforts at retroactive justice may raise is what to do when the regime responsible for abuses has already enacted laws or instituted an entirely new legal regime officially sanctioning or par-

doning its past abuses. One possible approach, applied by Germany in its prosecution of East German guards who shot persons trying to escape across the Berlin Wall, is to accept the validity of such already enacted nondemocratic laws but to prosecute human rights abuses as crimes under the laws in effect at the time. However, this approach yields satisfactory results only where one can plausibly argue that those acts were criminal under the previous regime. Nino's answer relies on the principle that persons should not benefit from their own wrongs—that is, those who have contributed to the suspension of democratically enacted laws that made human rights abuses criminal acts should not benefit from that decision by successfully claiming that no law criminalized their conduct or that nondemocratic laws sanctioned or pardoned such acts. This interpretation is consistent with the current trend under international law—as evidenced by reports of the UN Human Rights Committee and the Inter-American Commission on Human Rights<sup>2</sup>—to the effect that domestic laws, such as self-amnesties, that grant impunity to perpetrators of abuses should be denied legitimacy.

As to the moral problems posed by retroactive justice, Nino considers and rejects a retributive view of punishment in favor of a preventionist view, which holds that punishment should be used to protect society from future harm. To avoid the criticism that preventionism views people as mere means to an end, Nino suggests that an individual may be deemed to have consented to punishment if he or she voluntarily commits a crime knowing that the crime carries normative consequences, even if that person does not consciously or willingly accept the law upon which that consequence is founded.<sup>3</sup> The applicability of this concept to transitional regimes is evident: although it is difficult to conceive of members of any repressive government overtly consenting to punishment, their acts (e.g., the widespread enactment of self-amnesties and their assertions that they operated in a state of war against internal

<sup>2</sup> See Naomi Roht-Arriaza, *Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 57, 59–60 (Naomi Roht-Arriaza ed., 1995).

<sup>3</sup> Nino here relies on his earlier work, *The Ethics of Human Rights* (1991), which contains a much more rigorous discussion of the role of consent in his theory of punishment.

subversives) clearly indicate an awareness that, under ordinary circumstances, their treatment of their opponents would carry consequences under criminal law. Thus, Nino argues that retroactive justice is morally justified where the actor was aware at the time of the commission of the act of a prior legal norm, clear international law, or a clear positive moral norm proscribing the act. Nino believes that, in almost all recent transitions, these conditions are satisfied.

The author's embrace of preventionism raises the inevitable question of how much retroactive justice is necessary to protect a society from future harm. While rejecting the notion—both on moral grounds and because of the instability such a program would engender—that all human rights violations must be punished, he answers that some trials are necessary because of their unique power to combat “those cultural patterns and . . . social trends that provide fertile ground for radical evil” (p. 146). Trials encourage citizens to deliberate on the military's role in a democratic society and the serious potential consequences of forgoing democracy and the rule of law. Nino also believes that at least some trials are necessary to achieve democratic consolidation because they represent an authoritative process for revealing and memorializing the truth, highlight the rule of law through their formal and legal nature, and restore self-respect to the victims.

Nino is confident that trials helped the Alfonsín Government to successfully consolidate democracy in Argentina. However, his conclusion that democratic consolidation in fact occurred and that such trials have been helpful have been challenged, both by those scholars who advocate broader efforts at retroactive justice such as Alejandro Garro and Jaime Malamud-Goti,<sup>4</sup> and by those who have questioned the utility of trials in transitions to democracy, such as Samuel Huntington and Bruce Ackerman.<sup>5</sup> Both groups point to subsequent acts by

the Menem administration—such as the packing of the Supreme Court, economic reform by decree, and pardons for human rights violators—and the administration's continuing popularity, despite these acts, as proof of an absence of popular appreciation of the separation of powers and the rule of law.

If the trials did not serve to consolidate Argentine democracy, it is fair to ask, as the foregoing authors and others have, whether Argentina's transition to democracy would have been more effective if there had been either more or fewer trials. Given the stresses that Nino describes in even the limited number of trials held, his conclusion that many more trials would have weakened democratic consolidation by threatening or even ending the transition seems reasonable. However, Nino does not adequately discuss the possible consequences of having held fewer trials, which might have allowed the Alfonsín administration to devote more attention and energy to other initiatives, such as legal, judicial, and economic reform. Moreover, the chief value Nino believes trials bring—the promotion of public deliberation over the cultural and social trends that may engender gross violations of human rights and threaten a democracy—can be advanced through other official means, such as truth commissions, even if these carry less weight than full-blown trials. In some instances where transitional governments have decided to use truth commissions as the primary instrument to promote public deliberation—such as in Chile and South Africa—it is not clear that democratic consolidation has been fundamentally weaker than that achieved in Argentina. In other cases where trials were not held, such as El Salvador, democratic consolidation appears to have lagged. Do these examples suggest that causation runs from trials to democratic consolidation, the other way, or not at all? One answer suggested by Nino's own account of the troubled Argentine experience is that each transition to democracy will have a unique combination of factors that determine whether retroactive justice in the form of actual trials is indispensable or whether alternative means to facilitate public deliberation and democratic consolidation would better suit the needs of society. Although generally acknowledging this critique of pursuing retroactive justice, Nino's belief that the Argentine trials contributed fundamentally to successfully consolidating Argentine democracy leads him to give insufficient

<sup>4</sup> Alejandro M. Garro, *Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?* 31 COLUM. J. TRANSNAT'L L. 1 (1993); Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fleeting Democracies: The Case of Argentina*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 2, at 165.

<sup>5</sup> SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991); BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992).

attention to the other aspects of societal reconstruction that transitional societies face.

Finally, in light of the attention that scholars of international law and human rights have given the issue of retroactive justice, Nino's omission of any real examination of the content of international law is surprising. This is especially the case since, under Nino's consensual theory of punishment, clear international law will permit an inference of consent to punishment on the part of a person charged with human rights abuses. Moreover, such an examination of international law might have shown that an international duty to prosecute does not in any case require an expansion of prosecutions beyond what Argentina was in fact able to accomplish and which Nino defends.

While the author could have paid more attention to these dimensions of his topic, these lapses do not detract from the importance of this work. In *Radical Evil on Trial*, Nino has given us his distinctive approach to retroactive justice, a singular and compelling contribution to the literature and an excellent introduction to his liberal political philosophy.

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*The Evolution of International Human Rights: Visions Seen.* By Paul Gordon Lauren. Philadelphia: University of Pennsylvania Press, 1998. Pp. xiii, 366. Index. \$49.95, cloth; \$29.95, paper.

The fiftieth anniversary of the Universal Declaration of Human Rights produced many commemorative events, among the most significant of which is this beautifully written and meticulously researched history of the idea of human rights. The author, a professor at the University of Montana, traces the streams of religious and philosophical thought that merged to become the modern human rights revolution and convincingly shows that the notion of human rights is global, ancient and evolving.

The book's chronological account begins with ancient sacred and philosophical texts, including not only classical Western philosophers who developed theories of natural law, but Asian, African and Middle Eastern writings with which the Western reader may be unfamiliar. The author leaves no doubt about the universality of the idea of "the inherent dignity and of the equal and inalienable rights of all members

of the human family" on which the Universal Declaration of Human Rights is founded. He illustrates how the values and visions derived from many different religious ideals inspired those campaigning for human rights, establishing a concept of responsibility toward humankind and setting forth duties that evolved into claims of rights.

Among the many pleasures of reading this book is discovering the richness of the human rights tradition. Along with Plato and Aristotle are excerpts from Cicero, Mencius in China, Aśoka in India and Al-Farabi in the Middle East. To the English Magna Carta is added the Persian Charter of Cyrus and the Norwegian Magnus Lagaboters Landslov of 1275, in which King Magnus promised equality before the law. Along with the oft-cited 1789 Declaration of the Rights of Man and Citizen, the author quotes from the Declaration of the Rights of Woman and Citizen, written by Olympe de Gouges in 1791. Lauren has taken to heart the admonition of Abigail Adams and "remember[ed] the ladies" (p. 16). In addition, and understandably, given his previous book, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (1996), a large part of the book concerns movements for racial equality.

In providing this wealth of material, Lauren undermines various human rights myths, especially the notion that early Western concepts of human rights concerned civil and political rights only. He demonstrates that European philosophers addressed "economic exploitation, social suppression, political despotism, torture, and ecclesiastical superstition and intolerance" (p. 15)—indeed, a wide range of human problems affecting the oppressed and the poor. He also shows how the revolutions of the period sought to resist both political and economic bondage, exemplified by the inclusion of economic and social rights in the French Constitution of 1791, which mandated public relief for the poor and free public education. Later, he recounts the struggles for improved conditions for workers, resulting in the creation of the International Labour Organization. The material suggests that the Western focus on civil and political rights is based more in contemporary political biases than in historical exclusion of economic, social and cultural concerns.

Lauren does not ignore the philosophical and religious theories antithetical to human rights, those based on inequality and hierarchy or a different view of human nature, from Ed-

and Burke and Thomas Hobbes to Johann Blumenbach and the proponents of slavery. He notes the widespread custom of hereditary rulers and privileges in various societies and discusses the supporting doctrines, from the divine right of kings to caste in India and the disparagement of heathens, pagans and infidels in Western religions. He also recognizes the profound challenge that ideas of racial and gender inferiority always have posed to the human rights message of equality. Consistent with his basic thesis on the force of ideas, Lauren indicates how attitudes of racial and gender superiority shaped customs and laws in many societies, producing systematic discrimination against women and racial minorities and justifying the institution of slavery. The quotations he includes are disturbing, as are the events discussed, including the execution of Olympe de Gouges after French deputies called for her and other advocates of the rights of women to be placed under the guillotine in 1793. The power of these negative messages indicates that a victory for the idea of human rights was not a foregone conclusion but, rather, constitutes the precarious outcome of a long and hard-fought battle.

Lauren also recognizes that human behavior rarely if ever conformed to the religious and philosophical ideals of human rights. As he points out, "Some of those governments and peoples in the West who so vocally claimed to follow the precepts of Christianity and the 'Prince of Peace,' for example, came to be known internationally as among the most rapacious and the worst offenders against the well-being and rights of others" (p. 29). He provides a salutary lesson in noting the chasm between theory and practice that existed when the U.S. and French Declarations and Constitutions were written. Like the Universal Declaration of Human Rights in 1948, these documents were neither deeply rooted in the culture of the times nor widely respected in practice. "[T]hey were statements of visions—ideals and aspirations toward which two nations pledged themselves to struggle in the future, but not to guarantee immediately at the moment" (p. 32). They nonetheless provided the basis for action by those who sought to make the vision a reality and gave rise to the first great transnational human rights movement, the antislavery societies.

In answer to the inevitable question of how the idea of human rights prevailed over ideas of

inequality and repression, Lauren sets forth two theses. First, he asserts that the human rights vision has an inspirational power derived from the hope contained in its message "of a world at peace and harmony as a result of the mutual respect of basic rights" (p. 282). It appeals to the best in human beings to live by ethical norms and values rather than the exercise of power and force. Accordingly, the idea has an appeal that transcends time and boundaries, touching the human spirit and moving countless numbers to action.

Lauren has a second, more provocative thesis: achievement of the vision of human rights has always depended upon wars, upheavals and revolutions.

All major breakthroughs in the long struggle for international human rights, as we shall see constantly, emerged in the wake of upheavals, wars, and revolutions. Although visions of human rights served as absolutely essential forces in these efforts, they rarely provided motives sufficiently powerful by themselves to move governments into effective action. Often, ironically, they . . . required significant shifts of power, the testing of existing institutions by disruption or chaos, or even violence and destruction to provide opportunities for serious reassessment and significant change. (Pp. 39–40)

While this thesis is given much support by the events described in the book, more attention could be paid to the massive and peaceful moves toward effective realization of human rights that occurred in the 1980s and 1990s in areas from South Africa to the former Soviet Union and Latin America. The consequences of these transformations are still unfolding, so perhaps it is too soon to include them in a historical volume. Nonetheless, it may be asked whether the human rights movement now has reached the point where advances can be achieved without the upheavals that allowed progress in the past. Perhaps not: would the statute of the international criminal court have been achieved without the conflicts in the former Yugoslavia and Rwanda?

Lauren's book is a legal history as well as a philosophical one. He refers to major treaties and national texts that are important for international human rights law. He discusses the emergence of the concept of sovereignty following the Treaty of Westphalia and the role of sovereignty as a leading stumbling block to international legal protection of human rights.

Curiously, the provisions of the Treaty of Westphalia that called for tolerance of religious minorities are overlooked, as are other efforts to protect religious minorities prior to the nineteenth century.<sup>1</sup> In Lauren's view, international legal efforts only began in the nineteenth century with efforts to combat slavery and the worst excesses of war, followed by struggles to improve the equality of women and the status of workers. He provides a compelling discussion of each, showing how the mobilization of public opinion is a major force for change in democratic societies.

More than three-quarters of the book describes efforts to achieve international human rights guarantees during the twentieth century and, in the process, it makes clear that globalization is not a new phenomenon. The impact of technological change in transport and communications, together with diplomatic and economic interaction, has led to increasing international actions from the beginning of this century, including the creation of many of today's multitude of international organizations. Lauren notes that thirteen intergovernmental bodies and more than three hundred nongovernmental organizations (NGOs) began work between the turn of the century and the beginning of World War I.

The global reach of Lauren's scholarship continues to be revealed in the later chapters of the book, where he includes the writings of Asian human rights advocates and discusses human rights movements among indigenous peoples. Chinese writer Kang Youwei's work promoting individual liberty, freedom, equality and other rights is particularly noteworthy, as is the inclusion of Gandhi's protests over racial discrimination against Indian immigrants in South Africa. If there is a gap, it is with respect to Latin America. There is no discussion of early regional efforts to combat the slave trade (e.g., in the 1825 Treaty of Confederation and Perpetual Union proposed by Simón Bolívar) or the human rights resolutions and treaties of the Pan American Union, most of which preceded similar texts at the global level.

Protests and even intervention on behalf of beleaguered groups became common prior to World War I, and stirrings of nationalism and claims of self-determination arose. Advocacy of women's rights became stronger, with women's

groups pressing for equal rights from China and Japan to Turkey, Egypt, England and the United States. Lauren demonstrates the enormous impact of World War I on propelling these human rights claims forward, noting that the "extensive participation of nonwhites and non-Westerners in the combat of World War I proved to be of extraordinary importance in the subsequent development of African and Asian nationalism and visions of human rights, including that of self-determination" (p. 85). Ho Chi Minh, Zhou Enlai and Lamine Senghor are cited as leaders who became politically active as a result of their experiences during World War I.

The complexity of the Paris Peace Conference and the interwar years is recounted with clarity and not a few surprises. While there is an expected discussion of the emergence of new states, the Minorities Treaties and the founding of the International Labour Organization, Lauren also pays attention to less widely known efforts to provide economic and social rights, especially the right to food. Herbert Hoover's statement that "[i]t is impossible to discuss the peace of the world until adequate measures have been taken to alleviate the fear of hunger" (p. 96) anticipates the better known "four freedoms" speech of Franklin Roosevelt.

There is great drama in the author's discussion of human rights provisions of the Covenant of the League of Nations and a sense of lost opportunity attending the omission of proposed provisions guaranteeing freedom of religion and gender equality. In Lauren's view, however, the great issue of the Paris Peace Conference was race. His fascinating summary of the debates recounts exchanges between the Japanese delegates, who sought to ensure equal treatment of all races, and the intransigent opposition of Europeans. In one of the milder comments, the British Foreign Secretary is quoted as denying that all men are created equal and certainly "not that a man in Central Africa was created equal to a European" (p. 100). The shocking climax of the debate is brilliantly told.

In spite of, or perhaps because of, the failure to include human rights guarantees in the Covenant of the League of Nations, the interwar period saw the emergence of large numbers of international organizations concerned with human rights. The Institut de Droit International began in 1921 to study the possibility of a declaration of human rights, issuing the completed

<sup>1</sup> Compare LOUIS SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973).



text in 1929. In 1928, the Académie Diplomatique Internationale formally proposed a global human rights convention under the auspices of the League of Nations. Many of the later leaders in human rights work at the United Nations and regional organizations were involved in these or similar efforts, including Henri Rolin and René Cassin.

The structural defects of the League of Nations and its political limitations are well described, as is the emergence of Fascist governments in Europe. The debates at the League over "the Jewish problem" are fascinating and disturbing. Lauren portrays the role of small states such as Haiti, which became the first state to propose a general regime for the protection of human rights, and shows the vested opposition of countries that feared losing their colonial empires if general equality was proclaimed.

Lauren's description of the World War II years reveals how important the idea of human rights became during the period. He believes that World War II demonstrated "the extreme consequences of the doctrine of national sovereignty and ideologies of superiority" (p. 145). Lauren also makes clear, however, the contrast between the wartime human rights proclamation and the actual situation within most Allied states, noting that "Allied governments thus found themselves forced—as never before—to acknowledge their hypocrisy" (p. 150). Throughout the war, the movement for human rights gathered force, as individuals and groups drafted statements on behalf of human rights and proposed declarations that became sources for the Universal Declaration. This vast movement of public opinion built momentum up to the founding of the United Nations.

An engaging description of the debates after World War II within the U.S. Department of State over an international bill of rights is coupled with an account of the Dumbarton Oaks conference where the strong proponents of human rights, especially racial equality—the Chinese—were opposed by the other powers present. The opposing Western politicians failed to anticipate the public pressure for human rights that became evident during the drafting of the UN Charter. Lauren demonstrates how the small nations and NGOs pressured the large powers into support for human rights. British Commonwealth and Latin American countries played a major role, strongly insisting on human rights provisions in the Charter. The latter group, in particular, became

important in the drafting after a meeting in Chapultepec, Mexico, where they agreed on a common policy and called on the Inter-American Juridical Committee to prepare a draft "Declaration of the International Rights and Duties of Man," declaring their support for a system of international protection of these rights. The combination of government support and the work of NGOs and individuals placed human rights high on the agenda for the San Francisco Conference.

One of the most intriguing aspects of the book is its description of the role played by individuals at key points in the history of human rights. Lauren clearly believes that such persons have made a difference and he provides many examples of this. His recounting of the drafting of the UN Charter and the Universal Declaration of Human Rights is replete with descriptions of individual actions that contributed to the advancement of human rights.

Lauren's description of the early postwar period includes the Nuremberg trials, the movements for independence in colonial countries, and discussions in the UN General Assembly of human rights violations in Bulgaria, Greece, Hungary, Spain, the Soviet Union and South Africa. He notes the accomplishments of the first General Assembly, where the initiative was taken by non-Western countries, especially Egypt, India, Cuba and Panama. The Assembly unanimously adopted resolutions calling genocide a crime against humanity, condemning religious and racial persecution, supporting freedom of information and creating a Commission on the Status of Women.

The penultimate chapter presents the early work of the UN Human Rights Commission, especially the drafting of the Universal Declaration of Human Rights. Lauren has thoroughly combed the archives and presents many important details of the drafting process. The contributions of individuals and groups from around the world make clear that the Declaration had many ancestors, beginning with the first proposal of Panama, supported by Chile, Cuba, Ecuador, Egypt, France and Liberia. In Lauren's view, a crucial element leading to the successful drafting of the Declaration was the quality of persons appointed to the first Commission on Human Rights. The final chapter contains an overview of the impact of the Universal Declaration on national and international law, indicating the references in consti-

tutions and national laws and the international treaties based on the rights contained in the Declaration.

The book is extremely significant for students and young activists whose impatience to redress obvious wrongs often leads to a cynical view that individuals and ideals have no impact on the global realpolitik. Lauren asserts that ideas do matter, that the moral force of human rights is perhaps the most powerful basis for action against tyranny. The book is also a reminder that a "human rights culture" is inseparable from human rights law. Without education and an ultimate belief in the underlying foundations of human rights, the law will be destitute. In the vision of those who believed in and pressed the idea of human rights abides the source of the present framework of international and national human rights law. Their beliefs and their actions have made a difference, but much remains to be done, as Lauren discusses in his conclusions. To read in this book how far we have come and how far we still have to go is an inspiration to the activist and a challenge to the idle.

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*The Inter-American System of Human Rights.* Edited by David Harris and Stephen Livingstone. Oxford: Clarendon Press, 1998. Pp. xxv, 581. Index. \$125.

Collectively, the essays included in the book under review provide a comprehensive overview of the structure, evolution, practice and case law of the Inter-American Human Rights system. Published with an extensive bibliography and nine appendices of basic documents in the same volume, the book is an outgrowth of a conference held in London in 1995 for the purpose of introducing European jurists to the inter-American system. As the editors rightly observe, "[W]ith Europe now having to confront gross human rights violations, notably in the former Yugoslavia and Turkey, the American experience may have increasing resonance."

Considering the expertise of nearly all the authors, evident in the high quality of their wide-ranging contributions, the book not only opens a window on the system to European

readers; it may also be the best English-language treatment available to readers anywhere.<sup>1</sup>

Unfortunately, the book lacks currency. The Inter-American Human Rights system is still rapidly developing and although the book was published in 1998, most chapters consider little or no material after 1996; indeed, one chapter—New Zealand scholar Scott Davidson's otherwise excellent summary of system law on civil and political rights—seems to end in 1995.

Since much of the system's case law is post-1996, readers are left uninformed of some critical recent developments—for example, the first Inter-American Court judgment ordering release of a prisoner.<sup>2</sup> Moreover, it appears that at least some updating may have been possible; for example, Ellen Lutz included in her chapter on amnesties an important resolution published in early 1997 on the Chilean amnesty.<sup>3</sup>

Thus, readers may wish to update this book by consulting the Web sites of the Inter-American Court and Commission on Human Rights (accessible though the Organization of American States site, (<http://www.oas.org>)) or by consulting publications with more recent information.<sup>4</sup>

The issue of currency aside, the quality of the book is almost uniformly first-rate. Basic components of the system are expertly summarized. The Commission's organization and individual petition system are explained by long-time Commission staff attorney Christina Cerna, and

<sup>1</sup> A capable, but less expansive, treatment was previously given by one of the contributors to the book under review. SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* (1997), reviewed by W. Michael Reisman, 92 AJIL 784 (1998). Broad, but even less current, consideration may be found in THOMAS BURGENTHAL & DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS* (4th rev. ed. 1995). Several wide-ranging English-language contributions are included in *EL FUTURO DEL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS* (Juan E. Méndez & Francisco Cox eds., 1998) (essays on system reform, most of them in Spanish, by some of the same authors and including one co-authored by this reviewer) [hereinafter *EL FUTURO*].

<sup>2</sup> Loayza Tamayo Case, 1997 ANN. REP. INTER-AM. CT. H.R. [ANN. REP.] 191.

<sup>3</sup> Resolution, Garay Hermosilla, No. 10.843, 1996 ANN. REP. 156.

<sup>4</sup> E.g., the *Annual Reports* of the Commission and Court, published each spring; *EL FUTURO*, *supra* note 1; and 1-2 INTER-AMERICAN HUMAN RIGHTS DIGEST: THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1980-97 (Claudio Grossman & Robert Goldman eds., 1998) (excerpting Court case law by Convention article and by a more detailed subject matter index).

its country reporting system by Chilean human rights attorney Cecilia Medina. The Inter-American Court's operation is analyzed by Judge Antônio Cançado Trindade and its jurisprudence on reparations by Dinah Shelton, a leading academic expert. Former Commission President Tom Farer recounts the history of Commission efforts to cope with massive violations of human rights, particularly during the difficult years of the late 1970s and early 1980s when he held the office. Looking to the future, recommendations on system reform are presented in two chapters, one by Judge Cançado Trindade, and the second by co-authors José Miguel Vivanco, a leading practitioner, and consultant Lisa Bhansali.

The substantive law applied by the inter-American system is also well presented. Scott Davidson summarizes the law on civil and political rights, and Matthew Craven, an expert on economic, social and cultural rights, analyzes the system's still scant law in his field. Essays on three areas of special importance in the Americas are contributed by scholars Hurst Hannum on indigenous rights, Joan Fitzpatrick on states of emergency, and Ellen Lutz on amnesties.

While all these chapters remain accurate in the main, subsequent developments render most incomplete or obsolete in significant respects. For example, Cerna's chapter omits the 1997 mandate of an Inter-American Program for Promotion of Human Rights,<sup>5</sup> and the establishment in 1998 of a special rapporteur on freedom of the press.<sup>6</sup> Medina's thoughtful analysis of the debate over whether the Commission should provide draft country reports to governments for comment prior to publication is now academic in view of a 1997 rule change requiring the Commission to do so.<sup>7</sup> Her section on criteria for preparing country reports, even supplemented by a partial update in a later footnote, does not report all the criteria now published by the Commission.<sup>8</sup> Davidson's catalog of jurisprudence omits important later rulings, such as the Inter-American Court's first holding on double jeopardy<sup>9</sup> and its decision

that trials of civilians by Peru's special military courts violate due process of law.<sup>10</sup>

If the book has disappointments, they are the overview, by editor David Harris of the University of Nottingham, and a chapter on the system's interaction with Organization of American States political actors by Veronica Gómez, a research student at Nottingham. Both chapters competently describe the formal relationships, but the political chapter could be more informative on why things really happen as they do, while the overview risks leaving readers with the impression that the system actually works, which it rarely does. Such unqualified assessments as that the system has "achieved a great deal" and that the Commission has developed an "effective" system of *in loco* visits and country reports might benefit from closer familiarity with realities on this side of the Atlantic.

Despite these limitations, the book is an invaluable contribution to the subject. No serious student of the Inter-American Human Rights system can afford to overlook it.

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*The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems.* By Julianne Kokott. The Hague, London, Boston: Kluwer Law International, 1998. Pp. xxii, 286. Index. Fl 175; \$95; £50.

Every trained lawyer specializing in the field of human rights knows that the key to winning most human rights cases often lies not in substantive law, but rather in the proof of the relevant facts and the uncovering of hidden motivations of the government allegedly violating the human rights at issue. Ronald Dworkin said that human rights are legally protected not only because they are essential to the development of the personality, but also because we might suspect a government of violating them.<sup>1</sup> Indeed, judicial review of violations of human rights is essentially focused on the *fit*, or connection, between the government's objectives (i.e., national security, public order) and the

<sup>5</sup> 1997 ANN. REP. 23-26 (quoting OAS Gen. Ass. Res. AG/RES.1489 (XXVII-0/97)).

<sup>6</sup> See Second Summit of the Americas, Santiago, Chile, *Final Declaration* (Apr. 1998) (<http://www.cum.breil/summit/acueri.htm>).

<sup>7</sup> 1997 ANN. REP. 14 (amendment to Art. 63(h) of Commission Regulations).

<sup>8</sup> *Id.* at 929-30.

<sup>9</sup> *Loayza Tamayo Case*, 1997 ANN. REP. 191, 213-15.

<sup>10</sup> *Id.* at 212-13.

<sup>1</sup> RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 277 (1977).

applied means (i.e., censorship). Although the existence or nonexistence of this *fit* is an evidentiary question, it is deeply rooted in the substance of human rights.

For this reason, *The Burden of Proof* by Juliane Kokott, a professor of law at Heinrich Heine University in Düsseldorf, ably fulfills an important task. It both challenges the traditional legal distinction between procedure and substance in the human rights sphere and provides insightful links between substantive human rights law and questions of burden of proof. The author uses a comparative methodology—based primarily on an examination of U.S. common law and German civil law perspectives on evidentiary questions relating to human rights—to provide a well-structured, coherent and stimulating analysis of some important principles of proof in the sphere of human rights.

Kokott's methodology determines the structure of her book, which is divided into three chapters. The first compares the theory and the practice of U.S. and German constitutional law with regard to the burden of proof in human rights. The second shows how substantive U.S. constitutional law shaped evidentiary principles in human rights procedures. The third focuses on burden of proof principles as applied in the international law of human rights.

In chapter 1, Kokott presents German law as an example of an inquisitional legal system and the American legal system as representing an adversarial model. This difference has many implications for the burden of proof rules in both systems. For example, the distinction between the burden of *persuasion* and the burden of *production* of evidence, common in the American adversarial legal system, is somewhat blurred in the German inquisitional system. The reason hinges on the fact that in the inquisitional system the judge is not bound merely to the evidence produced by the parties. Another difference between those two systems is reflected in the principles of the *level of proof*. While the general principle of proof in German law requires the plaintiff to prove his case beyond a reasonable doubt in all areas of law (criminal, private and public law), U.S. law applies a different standard—criminal law requires proof beyond a reasonable doubt; in private law, the standard of a preponderance of evidence is usually prescribed; and the standard of proof in constitutional human rights law appears dependent on the importance of the right at issue.

Later in this chapter, Kokott examines various techniques of proof as applied to human rights law including, inter alia, judicial notice, legislative and adjudicative facts, and the presumption of constitutionality. This last technique is unique to the constitutional sphere because it touches on the sensitive concept of the separation of powers. She then goes on to examine which of the three branches of government is better situated to appreciate the legislative facts. In the final part of the first chapter, she develops the general theme of the book: principles of proof in human rights law should be developed from the applicable substantive law. Thus, whenever substantive constitutional law accords a right with a strong protection, there should be a strong evidentiary presumption in favor of the individual. This approach sensibly takes into account considerations of the separation of powers because it lowers the standard of review in cases involving, for example, property rights, and thus reduces the number of cases in which the court would be willing to invalidate the legislator's decisions. It does not apply a strict approach to all infringements of human rights but, instead, considers the nature and the importance of the specific right involved.

Chapter 2 focuses on principles of proof in U.S. human rights law. As Kokott indicates, U.S. constitutional law adopts a three-level approach to judicial review (strict scrutiny, mid-level, and rational basis standards of review) in human rights cases that is generally dependent upon the importance of the rights and the "suspect" nature of the classification in issue. When the court applies a "strict" standard of review, it in practice shifts the risk of nonpersuasion to the government and ensures a strong presumption in favor of the individual. When a "rational basis" standard is applied, the opposite is the case. To illustrate this approach, she analyzes the U.S. Supreme Court's jurisprudence relating to the First Amendment and the Equal Protection Clauses. When an alleged governmental infringement touches upon a fundamental right, especially when core values are at stake, the Court shifts the burden of persuasion to the Government and requires a high level of proof to justify the infringement. Kokott persuasively argues that the appropriate standard of proof in these cases should be closer to the "beyond a reasonable doubt" criminal standard. Indeed, since in both involuntary civil commitment (i.e., in mental hospitals) and criminal cases

there may be a deprivation of personal liberty, it makes more sense to apply the same level of proof in both. This second chapter focuses more on substantive law than on procedural or evidentiary law. Indeed, at some points (especially in the sections dealing with freedom of speech), the reader might think that this chapter is concerned mainly with substantive human rights law. Although in this reviewer's opinion these sections weaken the chapter, they suggest the impossibility of dealing with the question of proof in human rights procedures without a thorough analysis of substantive law.

In chapter 3, Kokott surveys various principles of proof in the international law of human rights. In view of the relative absence of comprehensive studies in this sphere, the author relies extensively on general international law and on the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights. She also shows how her general comparative approach is relevant to the international protection of human rights.

One of the most intriguing questions in procedural international law is whether the international human rights tribunals should be adversarial or inquisitorial. Following an interesting analysis, the author concludes that procedures before international tribunals should be primarily inquisitorial, especially when *jus cogens* rights are involved. Her conclusion stems from the special nature of international procedures in the human rights sphere, the duty of the international tribunal to effectively enforce human rights treaties, the power gap between the state and the individual, the fact that the state has better access to the evidence, and concerns that the state might be motivated to hide "problematic" evidence. Subsequent sections of this chapter include a thorough discussion of what the author considers to be various principles of proof of international law, including the prohibition of *non liquet*, the negative principle of proof (all that is not forbidden is allowed), the principle of interpretation in favor of the state's sovereignty, and the principle of interpretation in favor of human rights. Of course, these principles (especially the last two) may collide. The author believes that the solution in such cases should be a

nals, which generally apply the standard of "beyond a reasonable doubt." In her view, this approach endangers the effectiveness of international protection of human rights. She indicates that only in exceptional cases (such as torture and disappearances)—when the most important rights were in danger—have international courts somewhat shifted the standard in favor of the individual.

The remaining sections of this chapter discuss the margin of appreciation doctrine, one of the most important evidentiary principles in international human rights law. The doctrine, which was originally established by the European Court of Human Rights, grants the contracting states some necessary freedom of action. The author shows how the granting of a wide margin of appreciation, in practice, has the result of shifting the burden of proof to the individual. The Court, however, has set out several factors shaping the breadth of the doctrine. Kokott demonstrates how the existence or non-existence of a European standard, as well as the importance of the right, affects the breadth of the doctrine. She criticizes the application of the first factor—the existence of a European standard—since it conditions the effectiveness of international human rights protection on the empirical situation (how the state *behaves* in practice) instead of on the normative obligations (how the state *should* behave) under the treaty. On the other hand, the second factor fits well into the author's general idea that evidentiary rules must accord with the importance and substance of the rights.

Overall, this is an important and stimulating book, which should be of great interest to those practicing human rights law anywhere in the world. The gaps in it are few, but it would have been useful to include at least a short discussion of the Canadian model of proof in human rights procedures. This model creates two distinct phases in constitutional review: the plaintiff must first prove an infringement of a right, and the Government must then persuade and produce evidence justifying the infringement.<sup>2</sup> This model has had an important influence on the jurisprudence of many jurisdictions,<sup>3</sup> and a

<sup>2</sup> See *Regina v. Oakes*, [1986] 1 S.C.R. 103, 137.

<sup>3</sup> For New Zealand, see *Ministry of Transp. v. Noort*,

discussion of its theoretical premises could have been illuminating and helpful.

But these few limitations should not detract from the many important and insightful ideas of the author: that substantive human rights law is an important source for evidentiary principles; that no general principle of proof should apply to all rights, but that evidentiary rules should instead depend primarily on the nature of the rights rather than on external factors; and that principled rather than ad hoc rationales must be applied. This book represents an important contribution to an understanding of the idea of human rights.

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*Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment.*

By Ryszard Cholewinski. Oxford: Clarendon Press, 1997. Pp. lxxii, 452. Index. \$95.

The subject of migrant workers continues to stir debate because of rising anxieties about illegal immigration and the uncertain status of third-country nationals in states engaged in processes of economic and political integration. This valuable and timely book by Ryszard Cholewinski traces the evolution of the important international instruments on the rights of migrant workers and their families. It assesses how these instruments meet the challenge of providing for those who are most in need of protection.

*Migrant Workers* consists of three principal sections. The first part traces the evolution of basic legal rules relating to the treatment of migrant workers as aliens, including the applicability of general international and regional human rights norms and instruments. The second part examines the rights of migrant workers specifically in their role as workers, focusing on Conventions No. 97 and 143 of the International Labour Organization (ILO) on migrant workers and on the 1990 UN Convention on the Rights of Migrant Workers and Members of Their Families. The third part evaluates regional standards and legal instruments for the protection of the rights of migrant workers,

particularly those developed under the auspices of the Council of Europe and the European Union (EU).

In part 1, the author draws a useful distinction between two conflicting approaches to providing legal protection to aliens. One approach favors the sovereignty of individual states in matters of treatment of aliens, leaving national standards to be set by each state unilaterally. The other approach assumes that there are fundamental international standards of justice that should govern the treatment of aliens. In recent years, with the increasing recognition of international human rights instruments, the trend has clearly been toward giving individuals, including aliens, more direct protection of their rights and freedoms through legally enforced provisions of contemporary international law. Cholewinski argues that, although international minimum standards may in theory offer better guarantees of protection, it is still too early to reject the national standards approach. In the first place, enforcement of international instruments is relatively weak. Moreover, a number of states, including the United States, are not parties to relevant important international human rights instruments. He makes the interesting point that in states that provide nationals with comprehensive safeguards, particularly in the field of economic and social welfare, a standard of protection based on minimum international standards may be inferior to a national standard requiring that aliens receive equal treatment with nationals.

In part 2, Cholewinski traces the evolution of the standards relating specifically to the protection of migrant workers and members of their families in ILO Conventions No. 97 and 143 and those dealing with social security. He weaves into his review interesting details on the history of that evolution, the contentious issues for the major protagonists in the negotiations, and the important external events taking place at the time that might have influenced their concerns and attitudes. This provides readers with a better appreciation of what the major articles of those Conventions actually mean. For example, the author's account of the preparatory work behind the drafting of ILO Convention No. 143 helps to clarify why receiving states have been reluctant to accept the principle of free choice of employment, especially those countries that do not see themselves as countries of permanent settlement. The author makes what could have been a very dry expla-

nation of some abstract principles into an interesting account of complex negotiations to reconcile differing points of view by examining perceptions of how far to push back state prerogatives to give room to individual rights.

Any analysis of international instruments in this field would not be complete without, first, an explanation that multilateral treaties establish legally binding obligations for a particular state only when that state has ratified the treaty and, second, an examination of the effectiveness of implementing mechanisms to ensure that states live up to their legal obligations. Although Cholewinski fails to note that many important countries of immigration have ratified ILO Convention No. 97, he has made good use of the 1980 *General Survey of the Migrants' Conditions* to illustrate the problems faced by some states in ratifying the two ILO Conventions on migrant workers, especially No. 143, owing to conflicts between certain obligations in these Conventions and national policy or legislation. By pointing to concrete cases, especially in the book's extensive footnotes, the author makes it easier to understand the controversy over several important landmark principles, such as that on equal opportunity, which to this day remains the principal obstacle to wide ratification of Convention No. 143. It is useful to point out, however, as Cholewinski does that these Conventions, even if not ratified by all states, have nevertheless already succeeded in inspiring reforms of national legislation in a number of important countries, as well as providing models for bilateral agreements.

Cholewinski's account of the lengthy preparatory work and negotiations at the United Nations before the adoption of the 1990 UN Convention on the Rights of Migrant Workers and Members of Their Families is equally well researched and is indispensable to a full appreciation of both its innovative features and its failings. He points out that this convention improves on existing international instruments by, among other things, widening the definition of migrant workers and explicitly granting more rights to illegal migrants. The opposition of some major countries of immigration made it abundantly clear, however, even during the drafting of the convention, that these new features would at the same time constitute its weakness. Although remaining skeptical that the 1990 UN convention will ever muster the twenty ratifications necessary for it to come into force

(as of January 1999, there were only eight ratifications), Cholewinski considers the convention to be valuable both in providing a framework for establishing other international instruments in this area, particularly bilateral agreements between sending and receiving countries, and in setting norms as a benchmark to evaluate existing national standards in developed as well as developing countries.

Part 3 examines the instruments for the protection of migrant workers in western Europe, where there has recently been a proliferation of multilateral agreements on the subject, notably under the auspices of the European Union and the Council of Europe. One can easily share Cholewinski's disappointment that none of these instruments adequately protects the rights and interests of migrants other than citizens of the member states. Fortunately, a few of the member states already have national legislation that guarantees equal treatment and promotes integration of legal immigrants. While the European Commission has long been taking initiatives to promote equal treatment of third-country nationals, key member states such as Germany and France have challenged what they view as encroachments on their respective sovereignty over access, residence and employment of migrant workers from third countries. This book provides an extensive review of provisions of European multilateral agreements relating to illegal migrants and concludes that the rights of illegal migrants are almost wholly unprotected by the Council of Europe instruments and by EU law.

*Migrant Workers* offers the most comprehensive survey of international instruments for the protection of the rights of migrant workers and members of their families available to date. It should be of interest to human rights advocates, policy makers and students of international law. For specialists on migration issues, the exhaustive research that evidently went into the book's preparation should be especially satisfying. The book's extensive footnotes—which take up more space than the text—provide detailed references to treaties, resolutions, national legislation and court cases. The book should be widely used for many years to come.

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*Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements.* By Daniel J. Elazar. Lanham, MD: Rowman & Littlefield Publishers, Inc., 1998. Pp. vii, 233. Index. \$23.95, paper; \$63.00, cloth.

Studies of the emergence and function of international organizations and more informal international regimes are assuming a central place in the discipline of international relations. While this concern appeared at least as early as the work of Hugo Grotius (1583–1642), several recent books have significantly advanced this stream of study. Michael Walzer's *Just and Unjust Wars* (1992), for instance, employs the notion of a "domestic analogy" to investigate whether a parallel relationship exists between politics within a state, on one hand, and reaching normative consensus among actors within the international system, on the other.<sup>1</sup> R. B. J. Walker's *Inside/Outside* (1993) has challenged the validity of theoretical distinctions between politics within and beyond state borders, arguing that the long-understood theoretical distinction between domestic and international politics is an aspect of world politics and not an explanation of them.<sup>2</sup> Finally, Paul Wapner's *Environmental Activism and World Civic Politics* (1996) has argued for the existence of a global civil society which, along with states, serves to "define and shape [global] public affairs."<sup>3</sup>

The work of these authors and others leads us to ask whether the distinction between global politics and "domestic" and "intra-state" politics is merely one of scale. Although primarily a scholar of federalism, Daniel Elazar, a professor of political science and director of the Center for the Study of Federalism at Temple University, makes a substantial contribution to the literature of global governance by drawing on history and theory. In his introduction, Elazar outlines how globalization is changing the context of world politics and generating new social strains in such areas as the environment, ethnic relations and trade. He further contends that confederal governing structures may provide an appropriate means for mediating these ten-

sions. Following the work of Ivo Duchacek,<sup>4</sup> he then discusses both the evolution of confederal governing structures over time and the compatibility of confederal governance with these newly prominent policy challenges.

As defined by Elazar, federalism is

the combination of constitutional choice, design, and institution-building to accommodate both existing states and trans-state linkages . . . by combining self-rule and shared rule in such a way as to ensure that shared rule will be confined only to those functions where it is absolutely necessary or clearly more useful to the politics and peoples involved. (P. 3)

He adds that "[f]ederalism does not concentrate on questions of sovereignty, but on questions of . . . jurisdiction. Sovereignty is quickly disposed of by being vested in the hands of the people, who distribute governmental powers to various authorities as they deem appropriate" (p. 199).

Elazar defines confederal governance in contrast with federalism; a different emphasis on the principles of subsidiarity and liberty distinguishes confederation. "In a federation," he notes, "the largest [political] arena" exercises the greatest influence over outcomes, while in a confederal structure, "the basic constituent arenas . . . constitutionally and practically [act as] the fulcrum of the whole model" (p. 60).

Traditionally, most observers of international affairs have assigned great analytic importance to the Treaty of Westphalia (1648), which formalized a world political system composed of state actors exercising equal, exclusive sovereignty over defined territories. As Elazar notes, however, the expansion and enhancement of economic and military activity over recent decades have placed in question the allocation of authority dictated by the Westphalian order. Elazar joins the ranks of such writers as Anthony Giddens (1990),<sup>5</sup> Arjun Appadurai (1996),<sup>6</sup>

<sup>1</sup> MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (2d ed. 1992).

<sup>2</sup> R. B. J. WALKER, *INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY* (1993).

<sup>3</sup> PAUL WAPNER, *ENVIRONMENTAL ACTIVISM AND WORLD CIVIC POLITICS* (1996).

<sup>4</sup> IVO DUCHACEK, *COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS* (1970); Ivo Duchacek, *Antagonistic Co-operation: Territorial and Ethnic Communities*, *PUBLIUS*, No. 4, 1977, at 3; *Consociations of Fatherlands: The Revival of Confederal Principles and Practices*, *PUBLIUS*, No. 4, 1982, at 129; and *Dyadic Federations and Confederation*, *PUBLIUS*, No. 2, 1988, at 5.

<sup>5</sup> ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* (1990).

<sup>6</sup> ARJUN APPADURAI, *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* (1996).



Martin Albrow (1997),<sup>7</sup> and James Rosenau (1997),<sup>8</sup> contending that social changes engendered by increasing globalization have driven "a paradigm shift from a world of states . . . to a world of diminished state sovereignty and increased interstate linkages" (p. 17).

Like other analysts of globalization, Elazar subscribes to the division of history into epochs, choosing premodern, modern and postmodern periods for his typology. He cites the advent of nuclear weapons, extensive worldwide flows of goods and information, recognition of a global environment, and an expanding consensus on human rights as markers for the consolidation of a postmodern era. Elazar asserts that, in this new context, "the state system is acquiring a new dimension, one that . . . is now coming to overlay the [Westphalian] system that prevailed throughout the modern epoch" (p. 19). As a major factor in the acceleration of this shift, he highlights "the . . . legitimization of ethnic identity" (*id.*) and national self-determination, which he associates with the postmodernist preference for local knowledges over global norms.

In short, Elazar finds that

[The implications of this [post-Westphalian] paradigm shift are enormous. Whereas before . . . state[s] strove for self-sufficiency, homogeneity, and . . . the concentration of authority and power in a single center, under the new paradigm all states have to recognize as well their interdependence, heterogeneity, and the fact that their centers, if they ever existed, are no longer single centers but parts of a multi-centered network . . . necessary in order to survive in the new world. (*Id.*)

Continuing this argument along lines similar to Karl Polanyi's (1944) notions of "embedding" and the "dual movement,"<sup>9</sup> Elazar notes both the globalizing and the localizing potentials of postmodernity. Here, he embarks on his above-mentioned theoretical contribution concerning the compatibility of postmodern social patterns resulting from increased globalization and confederal governing structures. While noting that "globalization offers greater opportunities to move in both directions" (p. 32), Elazar

also points out that such "movement . . . requires political structuring for governance anchored in appropriate constitutional frameworks" (*id.*). Immediately, then, the author points to the frameworks he perceives as matching postmodern world society: "As the dust settles in the 1990s, we find more federations than ever before covering more people than ever before. These can be seen as the foundation stones of the new paradigm" (*id.*).

In tracing the progress of confederal structures in world politics, Elazar's study considers both the emergence of modern states—including the United States—and the development of intergovernmental organizations, particularly in Europe. He notes that, consistently, confederation has involved transformation of a polity "from the effort and ideal of being totally sovereign and self-sufficient to becoming autonomous jurisdictions within a larger system" (p. 4). While confederal structures "vary in the degree to which they bind their members" (p. 6), Elazar also finds that their plural focus "has played a role in restoring democracy in various states," including Spain, Argentina and Brazil, and in the reunification of Germany (p. 33). For the author, confederal structures bypass hierarchical distributions of authority, deploying separated powers to frame a "matrix" of policy areas and jurisdictional domains. Elazar writes that as a new policy domain becomes salient in a confederal system, governing structures allow for the "organic" involvement of different interested parties, rather than subjecting each issue to mass political contention within and between states (pp. 55–58).

While providing a thorough history of confederal structures, Elazar recounts the emergence of functional integration through the European Union and the proliferation of similar regimes both across issue areas and in other geographic regions. The author reminds readers that

[p]eoples and polities can and indeed do claim to be sovereign without claiming the right . . . to be totally independent. They only reserve to themselves the right to decide how and in conjunction with whom they will exercise those of their powers that they are willing to delegate and emphasize that they have the sovereign authority to do so. (P. 63)

Elazar concludes that "[a] new world order has developed, based primarily on the same functional foundations as the European Union" (p. 156). Evaluating recent history, Elazar finds ev-

<sup>7</sup> MARTIN ALBROW, *THE GLOBAL AGE: STATE AND SOCIETY BEYOND MODERNITY* (1997).

<sup>8</sup> JAMES ROSENAU, *ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLORING GOVERNANCE IN A TURBULENT WORLD* (1997).

<sup>9</sup> KARL POLANYI, *THE GREAT TRANSFORMATION* (1944).

idence for the emergence of global confederal regimes concerning health, communications, environmental resources, intellectual property and agriculture, among other issues.

Since at least the end of World War I, one of the principal advantages cited by advocates for expanded application of international law lies in law's potential for establishing and maintaining peace. By contrast, Elazar's exploration of this topic yields a more nuanced impression of the peacemaking role of regimes. For example, he cites the role of "federal paradigms" in advancing the resolution of long-standing confrontations in South Africa, Northern Ireland and the Middle East (p. 35). At the same time, Elazar notes that, although the state of Yugoslavia possessed extensive federal institutions, it eventually degenerated into the Balkan crisis. What Elazar neglects to realize, however, is that it was the dismantling of the federal structure by Serbian President Slobodan Milošević that led to the initiation of the crisis and that the retention of a functioning federal structure or its re-creation might have prevented the Balkan conflict.

Indeed, Elazar contends that current "nationalist explosions are all based on a hidden premise that none of these small nation-states . . . will have to go it alone. Slovenia and Croatia would not have seceded from Yugoslavia [without] expectations that some day they [would] get into the European Community" (p. 90). Looking at state-diaspora relations—a topic increasingly engaged by such political theorists as Appadurai—he reaffirms a linkage between sovereignty and sustained group identity, writing that "ultimately, a people must have a state in order to have a diaspora" (p. 183).

Elazar acknowledges the limitations of territorially or substantively limited confederal solutions to areas beset by ethnic violence, such as in the territory of the former Soviet Union and the former Yugoslavia. He understands that embedding two opposed groups in the same relatively small political unit, particularly shortly after a conflict, would "rarely work." On the other hand, he sees great promise in the peace-making capacity of broad-based, wide-arena arrangements involving multiple partners beyond those in conflict, where "those engaged in or

reflecting ethnic conflict will also find it necessary [but] very difficult to stay out of [such] sharing arrangements" (pp. 219–20). Such a finding provides some degree of support for efforts in Latin America, the Middle East and eastern Europe to couple the resolution of conflict with conventions involving former combatants in regional cooperation structures.

In a relatively brief work, Elazar engages central issues of civic political theory and world politics. He further expands the scope of his work by informing his examination of federalism with concepts from historical sociology. However, while his study is intimately concerned with the mechanics and consequences of regime building, Elazar pays scant attention to the social origins of the ideas and principles forming the foundation of international law and the genesis of binding authority. This criticism is particularly warranted because he accepts the validity and necessity of multiple value frames and ideologies without explaining how societies come to prefer one set of principles over another. Moreover, some of his interpretations of institutional history—particularly with respect to the Commonwealth of Independent States and the developing world—seem a bit optimistic.

Nevertheless, *Constitutionalizing Globalization* is a valuable addition to the literature of globalization. Like few other contemporaries, Elazar has seriously brought his background in inter-governmental relations to bear on questions of an emerging global polity. The historical sections support the author's thematic contentions and suggest the existence of the trend he discusses. The book should thus be of significant use as a collection of provocative ideas for both graduate students and active practitioners. It might have been even more useful for international lawyers if Elazar had been better acquainted with the idiom of international law and used its terms, as relevant, in the course of his argument.

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## BRIEFER NOTICES

*Encyclopedia of U.S. Foreign Relations* (Vols. 1-4). Edited by Bruce W. Jentleson and Thomas G. Paterson. (New York, Oxford: Oxford University Press, 1997. Pp. lviii; 422; 490; 474; 426. Index. \$450.) The foreword to this imposing set, prepared under the auspices of the Council on Foreign Relations, describes it as "the first comprehensive, multivolume reference work on the history of America's foreign relations." In producing the work—whether it is the first of its kind or not—the Council has performed an extraordinarily useful service.

Expectably, the work is organized alphabetically, collecting 1,024 entries, by almost as many authors (mainly from academia), on topics ranging from World War II and George Washington to Sealing and Millard Fillmore. Its perspective is genuinely historical, covering 1776 to the present (mid-1996), notwithstanding that the twentieth century appears to predominate in coverage and some of the more contemporary entries, one suspects, would drop off the roster should the work be updated a century hence. Entries range in length from between 150 and 1,000 words (756 entries) to between 5,000 and 10,000 words (51 entries). The remainder range between 1,000 and 5,000 words.

The fifty-one entries in the last category make a large contribution to the encyclopedia's usefulness. They provide extensive treatment of major episodes, themes, issues or aspects of U.S. foreign relations, such as the world wars, the U.S. Constitution, the American Revolution, the environment, international trade and commerce, the Cold War and others, each supported by an array of shorter entries on subsidiary topics. Taken with the introduction to the four volumes, which is intended as a "brief overview of the nature of U.S. foreign relations," they provide a ready organizing framework for the multitude of otherwise freestanding entries.

The entries are further augmented by a set of appendices providing a chronology of U.S. foreign relations, a table providing basic statistical data on the states that are currently members of the United Nations, and a bibliography of reference works classified by topic.

An authoritative assessment of the content of all entries or even all major entries is obviously beyond the scope of this review. I will note that

in a high percentage of the entries the authors or their editors have achieved an admirable clarity of prose and evenness in expository approach—no mean feat in an enterprise involving hundreds of authors. However, some entries appear to have been written without specific knowledge of the content of other entries on related topics, and to integrate them one must rely on the sometimes incomplete cross-references appended at the end of each entry.

International lawyers will find some grounds for criticism. Louis Henkin's otherwise fine piece, *International Law*, was accorded too little space to accommodate the pervasiveness, detail and ramification that characterize contemporary international law. Entries on the Supreme Court and the judiciary (also by Henkin) and the Constitution (by Harold Hongju Koh) fared better. Astonishingly, not only is there no separate entry on the International Court of Justice (ICJ), but in the index it is ignobly swallowed up by the Permanent Court of International Justice (PCIJ). In the text, the PCIJ has a tiny entry, but anyone interested in the ICJ must be satisfied with a couple of paragraphs in Harold Jacobson's useful survey of the United Nations and occasional specific references in other entries. Although hardly the linchpin of U.S. foreign policy, the World Court nevertheless warranted more attention. Again, the article on human rights, by Jack Donnelly, gives the international legal and institutional aspects of human rights in U.S. foreign policy even less attention than they merit—in contrast to major articles such as *Environment* by Kurk Dorsey and *International Trade and Commerce* by Stephen D. Cohen. The "international law" entry in the bibliography of reference works is oddly truncated, listing, for example, the Hackworth and Whiteman *Digests* of international law, but omitting the subsequent annual volumes published by the Department of State and also omitting mention of either of the American Law Institute's influential *Restatements* of foreign relations law.

Such shortcomings aside, one would be hard pressed to find another single work of greater potential utility to persons (including international lawyers) broadly interested in the U.S.

role in international affairs. One hopes the Council on Foreign Relations and the publisher have in place a means for producing updated supplements or revised editions in future years. Next time around, adding an international law scholar to the editorial team would be advisable.

JOHN LAWRENCE HARGROVE  
Of the District of Columbia Bar

*Multilateral Treaty Calendar, 1648–1995. Répertoire des traités multilatéraux, 1648–1995.* By Christian L. Wiktor. (The Hague, Boston, London: Martinus Nijhoff Publishers, 1998. Pp. xlvii, 1542. Index. Fl 151; \$278; £175.) This book is important and ambitious, listing the name and indicating the substance and other information (but not the text) of all multilateral (but not bilateral) treaties signed from 1648 through 1995. Christian Wiktor is a professor of law and law librarian at Dalhousie Law School in Halifax. I attribute the high quality of this book to the fact that Wiktor is a long-standing authority on the history and substance of treaties and is also a law librarian highly skilled in the categorization and management of international legal information. Indeed, the introductory materials provide a splendid brief tour of the history and nature of treaties, a tour that would benefit many students encountering treaties in a survey course in public international law.

The *Calendar* "includes 6048 entries and covers the period from October 24, 1648, to the end of 1995" (p. xxi). Wiktor uses the Vienna Convention on the Law of Treaties (1969) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) to develop a clear, explicit standard for deciding which multilateral instruments to include. The treaties are ordered chronologically by the date of signature or of adoption if they were produced by an international conference. It is easier to appreciate the nature and utility of the *Calendar* if one examines a typical entry (p. 527):

July 27, 1950

Rivers

Agreement concerning the social security of Rhine boatmen, with annex. *Accord concernant la sécurité sociale des bateliers rhénans, avec annexe.*

Concluded between: Belgium, Germany (Fed. Rep.), France, Netherlands, and Switzerland

Done at Paris July 27, 1950

Printed text: 166 UNTS 73; 157 BFSP 560; JORF 1952:10787; 1960:1657; RTAF 1960/13 (561); 2 VBD A14 (F,G)

Depository: ILO

Duration: 3 years (initially)

Entered into force: June 1, 1953

Note: Refers to revised convention on Rhine navigation of OCTOBER 17, 1868; establishes an "Administrative Centre for the Social Security of Rhine Boatmen," with headquarters at the Central Commission for Rhine Navigation; superseded February 1, 1970, by agreement concerning the social security of Rhine boatmen (revised) on FEBRUARY 13, 1961; see also administrative arrangement of MAY 23, 1953.

This scheme is highly practical, providing much pertinent information while remaining brief. Wiktor provides a comprehensive listing of treaty series sources where the full text can be found. This will maximize the chance of locating treaty texts, especially for those who labor in less well endowed libraries. As indicated, the "notes" section of each entry explains the context and provides cross-references to related treaties. The fact that Wiktor personally checked "all citations . . . with the . . . printed sources" (p. xxiii) is indicative of the care exercised in preparing the *Calendar*.

A sterner test of the *Calendar*—one it passed with flying colors—is whether a treaty can be found when one does not know the date of signature or adoption. I tested this by using four logical conceptual routes one might take in searching for the illustrative treaty set out above: (1) Rhine River, (2) inland navigation, (3) social security, and (4) rivers. Wiktor's system of two separate indices—a seventy-one-page General Index and a twelve-page List of Geographical Subdivisions—made it possible for me to find this treaty quickly using any of my four routes.

The only major criticism I have of Wiktor's scheme for presenting information concerns states' relationship to the treaties. This can be an impossibly complex issue if one draws distinctions among signature only, accession, ratification, reservations and understandings. However, the number of parties to a treaty is relatively straightforward, although the range is huge—from three to almost two hundred. Wiktor's approach is "to list parties to a treaty concluded originally between a limited number of parties" (p. xxiii). This begs the issue

of what a limited number of parties is. I would have added an entry: original number of parties, current number of parties. For example, the Treaty of Rome (Treaty Establishing the European Economic Community as amended by subsequent treaties, signed Rome, March 25, 1957, entered into force January 1, 1958) would be represented as 6/15. The "6" is the number of parties at entry into force in 1958, "15" the most recent number of parties (1995 in this instance). Such an entry could be used for all treaties in the *Calendar* and would have increased uniformity.

Where does Wiktor's *Calendar* stand as compared to other treaty indices? Probably the most frequently used print source index for multilateral treaties is M. J. Bowman and D. J. Harris, *Multilateral Treaties: Index and Current Status*, first published in 1984. Bowman and Harris provide a listing of parties with cumulative annual supplements. In addition, the United Nations regularly publishes its *Multilateral Treaties Deposited with the Secretary-General: Status as of 31 December [of the year in question]*. This "bible" is an excellent source for treaties registered with the United Nations, providing a comprehensive list of parties, reservations and understandings. However, it is out of date before it reaches a single library. Although now almost twenty years old,

Peter H. Rohn's five-volume *World Treaty Index* (2d ed. 1984) contains information in many ways comparable to Wiktor's *Calendar*, except that it is not limited to multilateral treaties and does list all parties. Because of the care, intelligence and sensitivity to the subject with which it has been prepared, I expect Wiktor's volume to become the preeminent and authoritative print source among multilateral treaty indices. It has clear advantages over the other indices indicated, including ease of use, longer chronological reach, excellent citations to treaty series and a bilingual (English-French) character.

As Wiktor himself acknowledges, the number of electronic sources for treaty information, including the United Nations' own Web sites, is large and growing. We may reach the point in the not-too-distant future where a work like this should also list Web sites for the text and for parties to treaties. Perhaps the publisher would consider this as a supplementary service for those purchasing the book.

In view of the book's considerable cost, it is unlikely to find its way into many personal libraries. However, it should find wide use in law libraries, where it will be a major addition to the reference section. In sum, this is a meticulously crafted reference work by a scholar who has a thorough, multifaceted understanding of treaties.

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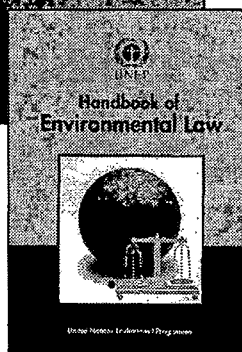
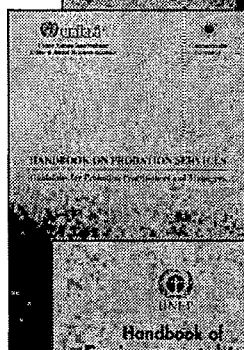
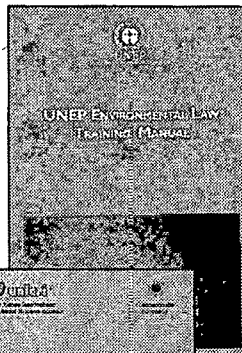
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